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STATUTE GRANTING TAX DEDUCTION FOR TUITION PAID BY PARENTS OF SECTARIAN AND NONSECTARIAN SCHOOL CHILDREN DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

Mueller v. Allen, 676 F. 2d 1198 (8th Cir.), *cert. granted,* 51 U.S.L.W. 3253 (U.S. Oct. 5, 1982) (No. 82-195)

In *Mueller v. Allen*[1] the United States Court of Appeals for the Eighth Circuit appears to have departed from the precedents of the Supreme Court by upholding, against a first amendment establishment clause[2] challenge, a Minnesota tax benefit package[3] containing a personal income tax deduction for tuition[4] paid by parents of private as well as public school children.

A group of Minnesota taxpayers[5] brought suit in the United States District Court for the District of Minnesota against the state tax commissioner and intervening taxpayers in order to challenge a statute[6] which provides school-related personal income tax deductions for the

1. 676 F.2d 1198 (8th Cir.), *cert. granted,* 51 U.S.L.W. 3253 (U.S. Oct. 5, 1982) (No. 82-195).

2. The first amendment states in pertinent part: "Congress shall make no law respecting an establishment of religion. . . ." U.S. CONST. amend. I.

3. *See infra* note 6.

4. *See infra* note 7.

5. The original suit was brought by five individual plaintiffs on behalf of the taxpayers of Minnesota. Through application of the res judicata doctrine, the court dismissed three of the plaintiffs when it found they had had an interest in Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978), a case decided three years earlier in which the same statute was challenged. Because *Roemer* was not a representative taxpayers' suit, the *Mueller* court refused to dismiss the two remaining plaintiffs. Mueller v. Allen, 514 F. Supp. 998, 999 (D. Minn. 1981).

6. MINN. STAT. ANN. § 290.09 (West Supp. 1982) allows the following deductions from gross income in computing net income:

> Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, Iowa or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and Chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

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parents of dependent elementary and secondary students. Plaintiffs charged that because the deductions applied to tuition,[7] transportation,[8] and textbook[9] expenses arising from a sectarian private education, the statute promoted the establishment of religion.[10] In addition, plaintiffs claimed that the statute violated the free exercise clause,[11] which was made applicable to the states through the due process clause of the fourteenth amendment.[12]

The district court, finding the statute neutral on its face and in its ultimate impact, rejected the establishment clause challenge.[13] The

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7. The district court found tuition to include regular full-time tuition, some summer school tuition, special tuition for students attending public schools in another district, tuition for private remedial tutorial services, tuition for school-provided instruction of students whose physical handicaps prevent them from attending regular classes, tuition for Montessori School, and tuition for driver education offered within the school curriculum. 514 F. Supp. 998, 1000 (D. Minn. 1981).

8. Transportation includes the cost of transporting all students who are not eligible for free transportation because they attend school outside their home districts or who do not live the required distances from their schools. Also included are those who live in school districts that provide no free transportation. *Id.*

9. The textbook provision encompasses the cost of secular textbooks and secular equipment, including gym shoes and suits for physical education class; rental fees for cameras, ice skates, calculators and musical instruments for class; art supplies, metals or woods and home economics materials to meet minimum fine and industrial arts class requirements; and pencils and special notebooks for class. *Id.*

10. *Id.* at 999. *See supra* note 2.

11. 514 F. Supp. at 999.

The free exercise clause follows the establishment clause and states: "Congress shall make no law . . . prohibiting the free exercisie [of religion]." U.S. CONST. amend. I. Usually, individuals challenging legislation on free exercise grounds seek exemption from a law that appears facially neutral but which in practice adversely affects those individuals because of their religious practices. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting Amish children from compulsory school attendance); Sherbert v. Verner, 374 U.S. 398 (1963) (striking down a state unemployment compensation law requiring sabbatarians to accept Saturday work or lose benefits); Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961) (rejecting request by Jewish merchant for exemption from Sunday closing laws). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 812 (1978) (tracing the incorporation of the first amendment religion clauses); Kauper, *The Warren Court: Religious Liberty and Church-State Relations,* 67 MICH. L. REV. 269 (1968) (discussing the early applications of the religion clauses to state law).

12. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (applying free exercise clause to states); Everson v. Board of Educ., 330 U.S. 1 (1947) (applying establishment clause to state); Cantwell v. Connecticut, 310 U.S. 296 (1940) (dicta supporting application of free exercise clause to states).

13. The district court admitted that the inclusion of both private and public school children, an apparently neutral classification, does not preclude an inquiry into the factual breadth of the classification. 514 F. Supp. at 1002. In the instant case, however, it found that the statistics offered by the plaintiffs as proof of a primary impact on sectarian institutions ineffective because of

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court granted defendant's cross-motion for summary judgment.[14] Plaintiffs appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed the decision and *held*: Although the statute covers expenses incurred at religiously affiliated schools, it has a valid secular purpose in the promotion of quality education.[15] In addition, because the primary effect of the statute is neither the advancement nor inhibition of religion,[16] it does not violate the establishment clause.[17]

The religion clauses[18] of the first amendment guarantee individual freedom from governmental intrusion into religious life.[19] Historically, James Madison[20] and Thomas Jefferson[21] promoted free exercise and

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the exclusion of figures representing at least two million dollars in annual tuition paid to Minnesota public schools. *Id.* As a consequence, the court pronounced the statute neutral. *Id.*

The district court also discounted the free exercise argument because plaintiffs failed to prove an infringement of their own religious beliefs. *Id.* at 1003.

14. *Id.*

15. Mueller v. Allen, 676 F.2d 1195, 1198 (8th Cir. 1982).

16. *Id.* at 1205.

17. The Eighth Circuit did not address the free exercise challenge. *Id.* at 1198. For an explanation of the free exercise clause and a challenge based on it, see *supra* note 12.

18. *See supra* notes 2 & 12.

19. *See generally* Kauper, *The* Walz *Decision: More on the Religion Clauses of the First Amendment,* 69 MICH. L. REV. 179 (1970) (promoting and protecting religious liberty as general purpose of both clauses); Merced, *The Protection of Individual Choice: A Consential Understanding of Religion Under the First Amendment,* 45 U. CHI. L. REV. 805 (1975) (both clauses ensuring freedom of choice despite often conflicting interpretations).

20. Madison viewed separation of church and state as essential for the freedom and security of both institutions. *See, e.g.,* Hunt, *James Madison and Religious Liberty,* 1 AM. HIST. ASS'N REP. 165 (1961); Note, *Toward a Constitutional Definition of Religion,* 9 HARV. L. REV. 1056 (1978). In 1786, Madison issued his "Memorial and Remonstrance" in denunciation of "A Bill Establishing a Provision for Teachers of the Christian Religion," an assessment bill introduced to the General Assembly of Virginia. Everson v. Board of Educ., 330 U.S. 1, 12 (1947). The bill was designed to replace the general tithe abolished in 1777 with general tax revenues to support religious institutions. *Id.* at 36 (Rutledge, J., dissenting). Although the final form of the legislation gave an individual taxpayer the option of applying the contribution to education rather than to a particular church, Madison would not relent and wrote:

> Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy. . . . Such a government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property. . . .

2 WRITINGS OF JAMES MADISON 183 (Hunt ed. 1900), *quoted in* Everson v. Board of Educ., 330 U.S. 1, 67-68 (1947) (Rutledge, J., dissenting). *See generally* G. SABINE, A HISTORY OF POLITICAL THEORY 194-95 (rev. ed. 1950) (discussing the forerunner of eighteenth century separatist thought, Pope Gelasius I, and his "two sword" theory).

21. When the Virginia Assembly defeated "A Bill Establishing a Provision for Teachers of the Christian Religion," *see supra* note 20, it adopted Jefferson's "Bill for Establishing Religious Freedom." Everson v. Board of Educ., 330 U.S. at 12. In contrast to Madison, Jefferson sup-

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nonestablishment[22] of religion as inseparable concepts.[23] In the past thirty-five years, however, the Supreme Court has frequently reviewed them independently,[24] focusing on cases involving the relationship between nonestablishment and education.[25]

In 1947,[26] the Court adopted the first tier in modern establishment clause analysis, the secular purpose test of *Everson v. Board of Education*.[27] The challenged New Jersey statute[28] in *Everson* prescribed free bus transportation[29] for children in private and public schools. Writing for the majority,[30] Justice Black reasoned that only a strict policy of no-aid[31] to parochial education could preserve the original meaning[32] of

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ported the separation of church and state because he feared ecclesiastical corruption of the state. *See* L. TRIBE, *supra* note 12, at 814. In Jefferson's words, the perfect relationship between religion and civil government is "a wall of separation." Letter from Thomas Jefferson to The Danbury Baptist Association (January 1, 1802), *reprinted in* 8 THE WRITINGS OF THOMAS JEFFERSON 113 (Washington ed. 1861).

22. Because the establishment clause is prohibitive, commentators often refer to it as the nonestablishment principle. *See, e.g.,* Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools,* 1 LAND & WATER L. REV. 475, 492 (1966). Both phrases will be used in this Comment.

23. *See* L. TRIBE, *supra* note 12, at 814. Tribe stated that the framers of the religion clauses viewed them as "at least compatible and at best mutually supportive." *Id.*

24. *See, e.g.,* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (considering the establishment clause alone in tuition tax deduction challenge). *But see* Abington School Dist. v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring) (commenting on the paradox of subordinating one clause to the other). *See generally* Schwarz, *No Imposition of Religion: The Establishment Clause Value,* 77 YALE L.J. 692 (1968) (noting the Supreme Court's tendency to consider one of the religion clauses while excluding the other).

25. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 772 (1973).

26. Between 1798 and 1947, the nonestablishment principle generated little case law. *See, e.g.,* Cochran v. Louisiana Bd. of Educ., 281 U.S. 370 (1930) (approving state loan of textbooks to nonpublic schools because of the public purpose); Quick Bear v. Leupp, 210 U.S. 50 (1908) (upholding use of monies held in Indian trust funds by the federal government for payment of tuition to parochial schools on reservations because of the private nature of the funds); Bradfield v. Roberts, 175 U.S. 291 (1899) (allowing federal funds to be used for the expansion of a hospital operated by a religious order because the purpose of the institution not religious).

27. 330 U.S. 1 (1947).

28. N.J. REV. STAT. § 18-14.8 (Cum. Supp. 1944) (current version at N.J. STAT. ANN. § 18A-39.1 (West 1968)).

29. The statute allowed local school boards to make contracts with bus companies for the transportation of students to nonprofit, nonpublic schools. 330 U.S. at 3. This arrangement led to a board of education resolution authorizing the reimbursement of the parents of children in public and Catholic schools for transportation expenses. *Id.*

30. Justice Douglas would later voice regret at having voted with the 5-4 *Everson* majority. Engel v. Vitale, 370 U.S. 421, 443-44 (1962) (Douglas, J., concurring).

31. Justice Black stated that the Constitution forbids the state to pass laws that aid one religion, all religions, or that show a preference for one religion over another. 330 U.S. at 15. Despite that pronouncement, the Court has never followed a strict no-aid policy. Five years after *Everson*

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the establishment clause. Nonetheless, incidental benefits to religious institutions are permissible if the legislation encompasses a valid secular purpose.[33] Applying this test, the Court held that legislation ensuring the safe delivery of children to and from school had a public welfare[34] rather than religious goal; consequently, the program was permissible.[35]

For sixteen years after *Everson*, the Court searched for valid secular purposes[36] as it struggled with the first amendment consequences of

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Justice Douglas wrote: "The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State." Zorach v. Clauson, 343 U.S. 306, 312 (1952). *See generally* Kauper, *supra* note 19, at 180 (asserting that in the Court's eyes, complete separation is impossible).

32. The Court sought to adhere to the original meaning of the clause as envisioned by Madison and Jefferson. *See generally supra* notes 21 & 22 (discussing the positions of Madison and Jefferson). Thus, it determined that a strict nonestablishment theory prohibits a state from setting up a church or passing laws to aid one or more churches. The state may not influence individuals to go to or remain away from a church. Moreover, a state may not punish individuals for religious involvement, levy taxes to support religious activities, or participate in the affairs of a church organization. 330 U.S. at 15-16. *But see* P. KAUPER, RELIGION AND THE CONSTITUTION 49 (1964) (discounting the applicability of Madison's and Jefferson's theories to contemporary conflicts between nonestablishment and education because the eighteenth century supporters of separation were addressing the problem of direct governmental support of the ecclesiastical establishment).

33. 330 U.S. at 17-18.

34. The public welfare rationale retains some vitality as the "child benefit" theory. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development,* 81 HARV. L. REV. 513, 576 (1968). Under this theory, a state may provide educational benefits to the individual pupil, but not directly to the school. *See* Wolman v. Walter, 433 U.S. 229 (1977). The *Wolman* Court approved the loan of textbooks, tests, therapeutic and diagnostic services, but disapproved the loan of equipment and materials for instruction, and reimbursement for field trip transportation. *Id.* The fine distinctions in what actually benefits the child, drawn by the *Wolman* Court, suggests the unpursuasiveness of the theory. *See* Hunter, *The Continuing Debate Over Tuition Tax Credits,* 7 HASTINGS CONST. L.Q. 523, 542-44 (1980). *See also id.* at 529 (discussing the narrow applicability of the "child benefit" theory in light of Douglas' reversal of his *Everson* position); *supra* note 30.

35. The Court warned that with its acceptance of the New Jersey statute it had approached the "verge" of constitutionality. 330 U.S. at 17-18.

36. During this period, the Court determined whether a statute had a secular purpose in three ways. *See* Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion,* 74 COLUM. L. REV. 1175, 1179 (1974). First, it examined the legislative decisionmaking process to determine the influence of sectarian lobbying efforts. *See, e.g.,* McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing laws supported secular, as well as sectarian interests). Second, the Court searched the statutory provisions for the required use of a strictly religious instrumentality. *See, e.g.,* Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (striking down required Bible reading in public schools). Third, it considered public interpretation of the legislative purpose. *See, e.g.,* Epperson v. Arkansas, 393 U.S. 97 (1968) (voiding state statute forbidding the teaching of evolution in public schools after consulting law review articles, letters to newspaper editors, and advertising campaigns to determine popular perception of legislative motive).

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Sunday closing laws,[37] released time arrangements[38] on[39] and off[40] public school premises, and prayer recitation in public schools.[41] When lawmakers began supplying clearly religious legislation with statements of secular purpose,[42] the Court avoided breaching the deference usually paid a collateral branch of the government[43] by adding a second level to the establishment clause inquiry: the primary effect test.

First applied in *Abington School District v. Schempp*,[44] the primary effect test arose from an establishment clause challenge to Bible reading and prayer recitation in public schools. The primary effect test demands that the principal consequences of a law neither positively nor negatively bear on religion.[45] Therefore, although a statute has a purported secular purpose, as in *Schempp*,[46] courts may invalidate it if it betrays government neutrality[47] by advancing or inhibiting religious

37. *See* McGowan v. Maryland, 366 U.S. 420 (1961) (upholding Sunday closing laws because of the secular value of reserving a day for rest).

38. A released time arrangement allows a public school district to set aside hours in a week for release of pupils who want religious instruction, but have no access to full time sectarian schooling. *See* Giannella, *supra* note 34, at 570.

39. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (invalidating release time program with religious instruction on public school property).

40. *See* Zorach v. Clauson, 343 U.S. 306 (1952). Writing for the majority in *Zorach*, Justice Douglas justified approval of releasing public school children for religion classes outside the public school premises by asserting that Americans are "a religious people" who want to encourage the free practice of religion. *Id.* at 313. *Compare* Giannella, *supra* note 34, at 531 (criticizing the Court for being too accommodating) *with* Kauper, *supra* note 12, at 269 (praising the Court for striking a realistic balance between free exercise and establishment).

41. *See* Engel v. Vitale, 370 U.S. 421 (1962) (prohibiting ecumenical prayer in public school classrooms).

42. *See* Note, *supra* note 36, at 1179.

43. *See, e.g.,* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (placing great weight on decisions of Congress and experience of FCC in evaluating "equal time" dispute); O'Gorman & Young, Inc. v. Hartford Fire Ins., Co., 282 U.S. 251 (1931) (Court trusting state's judgment on matter clearly within police power in insurance rate suit).

44. 374 U.S. 203 (1963).

45. *Id.* at 222.

46. The statute in *Schempp* prescribed Bible reading to promote moral values and teach literature. *Id.* at 223.

47. Neutrality is the essence of the primary effect test; however, strict neutrality has never been followed by the Court. *See, e.g.,* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (Jehovah's Witnesses excused from school flag ceremony). The Court accepts, instead, a "benevolent neutrality" view which allows accommodation of some religious practices to avoid destruction of the free exercise principle. *See, e.g.,* Anderson v. Laird, 466 F.2d 283, 291 (D.C. Cir.), *cert. denied,* 409 U.S. 1076 (1972) (dicta in case involving compulsory chapel attendance at military academy). *See also supra* notes 36-38. *See generally* Freund, *Public Aid to Parochial Schools,* 82 HARV. L. REV. 1680 (1969) (general discussion of neutrality and nonestablishment); Note, *supra*

practice.[48]

The purpose and effect test stood unaltered until 1970[49] when the Supreme Court, in *Walz v. Tax Commission*[50] denied an establishment clause challenge to the tax exempt status conferred by the New York Constitution on church property.[51] The *Walz* Court stated three main reasons for its holding. First, the Court explained that state and federal history[52] supported the acceptance of such an exemption. Second, because the religious institutions represented only a small percentage of the law's beneficiaries,[53] the promotional effect on religion was inconsequential.[54] Third, repeal of the exemption would force the government to conduct audits and property assessments on church premises, thus increasing contact between church and state beyond the limits of nonestablishment.[55] Concern with the last element, excessive entanglement between church and state,[56] represented a third step in subse-

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note 36 (discussing army chaplaincy program as example of strict neutrality giving way to benevolent neutrality).

48. For a discussion of the factors considered by the Court in determining whether the nature of a particular aid program, or the religious permeation of the recipient institution will have a primary effect that inhibits or advances religion, see Lemon v. Kurtzman, 403 U.S. 602 (1971) (Brennan, J., concurring).

49. The only significant establishment clause case in the last half of the *Schempp* decade was Board of Educ. v. Allen, 392 U.S. 236 (1968). In *Allen*, the Court relied primarily upon the secular purpose test and "child benefit" rationale of *Everson* to validate a state loan of secular textbooks to sectarian school pupils. *Id.* *See supra* notes 31, 32 & 34 (discussing the *Everson* logic).

50. 397 U.S. 664 (1970).

51. N.Y. CONST. art. XVI, § 1. The New York statute that activated the constitutional provision stated in pertinent part:

> Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical, or cemetery purposes . . . used exclusively for . . . such purposes . . . shall be exempt from taxation . . . .

N.Y. PROP. TAX LAW § 420(1) (Consol. 1981).

52. The federal government and every state grant churches a property tax exemption patterned after a Virginia statutory scheme adopted in 1800. 397 U.S. at 676-77.

53. The provision also exempted all property devoted to nonprofit educational facilities and charitable organizations. *See supra* note 51. Chief Justice Burger stated that in granting an exemption for church property, the legislature did not single out "one particular church, or religious group or even churches as such." 397 U.S. at 672-73. Moreover, religious property represented a single member in "a broad class of property owned by nonprofit quasi-public corporations." *Id.*

54. According to Chief Justice Burger, the benefits flowing to the religious institution must be more than "incidental" and remote to fail the primary effect test. *Id.* at 676. "There is no genuine nexus between tax exemption and establishment of religion." *Id.* at 675.

55. *Id.* at 674.

56. Three years after *Walz*, the Court invalidated a program not only because it promised to entangle church and state in complicated administrative procedures, but because annual appropri-

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quent establishment clause analyses.[57]

By coupling the primary effect inquiry with the excessive entanglement inquiry, the Court invalidated various attempts to aid parochial elementary and secondary schools.[58] The Court has invalidated reimbursement for the administration of teacher-prepared tests, graded by sectarian personnel but mandated by the state;[59] appropriation of funds for auxiliary services[60] for pupils; salary supplements for teachers of secular subjects in religious schools;[61] loans of secular instructional materials;[62] and funds for field trip transportation.[63] The Supreme Court's reasoning in these cases has often been perplexingly circular. A

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ation debates would immerse the state in heated church-related political debates as well. *See* Lemon v. Kurtzman, 403 U.S. 602, 620 (1971). The Court treated the second concern, fear of extensive political entanglement, as separate from administrative entanglement in the *Lemon* case. *See* Note, *supra* note 36, at 1189. Two years later, the Court downgraded the political entanglement test, stating that it could be considered a warning sign of excessive administrative entanglement, but "may not alone warrant the invalidation of state laws." Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 797-98 (1973).

The Court declared the combined entanglement test to be on a coequal basis with the secular purpose and primary effect tests two years after *Lemon*. *See* Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973). Nonetheless, *Lemon* remains the only decision after *Walz* to address administrative entanglement without connecting it to the primary effect test. *See* Hunter, *supra* note 34, at 533 (a disparaging discussion of the "bootstrapping" effect of such a pairing). Thus, although the Court discusses entanglement extensively, its value as an independent test is questionable. *See generally* Underwood, *Permissible Entanglement Under the Establishment Clause,* 25 EMORY L.J. 17, 19 (1976) (criticizing Court for inconsistency in using excessive entanglement analysis); Note, *supra* note 36, at 1188 (labeling the entanglement inquiry the least useful of the three nonestablishment tests).

57. For an earlier suggestion of an excessive entanglement criterion, see Board of Educ. v. Allen, 392 U.S. 236, 249 (Harlan, J., concurring).

58. The Court subjects aid to parochial elementary and secondary schools to a higher level of scrutiny than aid to sectarian colleges and universities. *Compare* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (disallowing a state grant to church-affiliated elementary and secondary schools for the repair and maintenance of secular buildings) *with* Tilton v. Richardson, 403 U.S. 672 (1971) (approving state grants to sectarian colleges for the erection of secular classrooms). *See generally* Hunter, *supra* note 34, at 529 ("Any proposal for public assistance to private schools below the college level which does not exclude assistance to sectarian schools . . . carries . . . a presumption of constitutional invalidity").

Chief Justice Burger supported the distinction because the lower levels of parochial education are an "integral part of the religious mission of the Catholic Church." Lemon v. Kurtzman, 403 U.S. 602, 616 (1971). Funding for the secular elements of a religious college is analogous to government funding of a church-affiliated hospital, because neither institution has "indoctrination" as its goal. *Id.* at 633 (Douglas, J., concurring). *See generally* Greenawalt, *Education in a Democracy: Financial Support of Private, Public and Parochial Schools,* 3 HUM. RTS. 17 (1973).

59. Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973).

60. *E.g.,* Sloan v. Lemon, 413 U.S. 825 (1973).

61. Lemon v. Kurtzman, 403 U.S. 602 (1971).

62. Meek v. Pittenger, 421 U.S. 349 (1975).

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program may be rejected if it includes no auditing procedure to ensure the continued nonreligious use of granted materials,[64] thus failing the secular purpose test. On the other hand, if a detailed audit is required by the legislation, according to the *Walz* rationale it may demand too much government surveillance, and thus offend the excessive administrative entanglement test.[65]

Beginning in the 1970s, the Supreme Court upheld a series of aid programs only vaguely distinguishable on the facts from those disapproved earlier.[66] Among the provisions approved were reimbursement to private schools for the cost of providing auxiliary services,[67] administration of state prepared and graded tests,[68] and maintenance of state-mandated records.[69] The inconsistencies of the Burger Court in determining the boundaries of nonestablishment in private education have prompted both supportive[70] and critical[71] commentary from the judiciary. In the area of financial aid to parents with children in nonpublic schools, however, the Court has been uncharacteristically consistent.

In 1973, the Supreme Court in *Committee for Public Education v. Ny-*

63. *E.g.,* McKeesport Area School Dist. v. Pennsylvania Dept. of Educ., 446 U.S. 970 (1980); Wolman v. Walter, 433 U.S. 229 (1977).

64. *See* Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973).

65. *See supra* note 58.

66. *See generally* Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause,* 81 COLUM. L. REV. 1463 (1981) (comprehensively discussing the Burger Court's willingness to make distinctions on "narrow factual grounds").

67. *See* Wheeler v. Barrera, 417 U.S. 402 (1974) (requiring federal funding of special programs for deprived children pursuant to 20 U.S.C. §§ 241a, 244, regardless of the ideological nature of the school attended), *modified,* 422 U.S. 1004 (1975).

Although the *Wheeler* Court did not address the first amendment issue, three justices did recognize a problem in providing services to private students. Such programs were invalidated in Meek v. Pittenger, 421 U.S. 349 (1975) and Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973). Wheeler v. Barrera, 417 U.S. 402, 428 (1974) (Powell, J., concurring); *id.* at 429 (White, J., concurring); *id.* at 429 (Douglas, J., dissenting).

68. *See* Wolman v. Walter, 433 U.S. 229 (1977).

69. *See* Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980).

70. Writing for the majority in *Regan*, Justice Powell admitted that the Court's decisions sacrifice "clarity and predictability for flexibility." *Id.* at 662. Powell argued, however, that no "litmus-paper test" distinguishing "permissible from impermissible aid to religiously oriented schools" would be available until the courts and states produce "a single, more encompassing construction of the Establishment Clause." *Id.*

71. Justice Stevens implored the Court to stop its attempts to justify "various subsidies to nonpublic schools . . . [r]ather than continuing with the sisyphean task of trying to patch together the 'blurred, indistinct and variable barrier' " between church and state. *Id.* at 671 (Stevens, J., dissenting) (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

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quist[72] applied the secular purpose,[73] primary effect,[74] and excessive entanglement[75] criteria to a challenge of a New York educational aid program.[76] The challenged legislation provided income tax deductions[77] for the tuition expenses of parents with children in private schools. Although a statement[78] incorporated into the statute survived scrutiny under the secular purpose test, the legislation failed at the primary effect level. The Court readily agreed with the district court's[79] view that the direct grant[80] and tuition reimbursement[81] provisions violated the establishment clause. Contrary to the district court, however, the Supreme Court concluded that the tax deduction plan encouraged parents to send their children to private schools,[82] the majority of which are church affiliated.[83] As a result, religious institutions[84] were effectively, and thus prohibitively, supported.[85] Failure at the second

72. 413 U.S. 756 (1973).

73. *See supra* notes 26-43 and accompanying text.

74. *See supra* notes 44-48 and accompanying text.

75. *See supra* notes 50-65 and accompanying text.

76. The program had three sections. The first provided direct grants to private schools in low income areas for maintenance and repair of facilities. The second established a predetermined tuition reimbursement for parents with a yearly income below $5000 who sent their children to nonpublic schools. The third provision entitled parents who made between $5000 and $25,000 annually and who sent their children to private schools to deduct a stipulated amount from adjusted gross income in calculating their state income tax. 1972 N.Y. Laws 1693.

77. Although the amount was subtracted from the adjusted gross income before the computation of tax due, the Court found that the deduction operated as a "credit" because the statute prescribed an amount unrelated to the actual tuition expense. Thus, the provision produced a "tax 'forgiveness' in exchange for performing a specific act which the State desires to encourage." 413 U.S. at 789. The Court emphasized, however, that the label was unimportant. *Id.*

78. *Id.* at 764. The legislature sought to preserve the "vitality of our pluralistic society." *Id.*

79. 350 F. Supp. 655 (S.D.N.Y. 1972).

80. The Court reasoned that if the federal government is prohibited from giving sectarian elementary and secondary schools funds for the erection of nonreligious buildings, it is also precluded from providing them funds for the maintenance of existing secular buildings. 413 U.S. at 777. *See also* Walz v. Tax Comm'n, 397 U.S. at 680 (Brennan, J., concurring) (unacceptability of direct transfer of monies to religious institution); *id.* at 700 (Douglas, J., dissenting) (danger of attempts by five states to directly subsidize private schools).

81. Tuition reimbursement to parents with children in private schools was given in addition to the right to send their children to public schools totally at state expense. 413 U.S. at 788. *See also* Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio 1972) (invalidating grants of $90 per dependent child in nonpublic school).

82. 413 U.S. at 791.

83. In New York, approximately 85% of the private elementary and secondary schools were church affiliated at the time *Walz* was decided. *Id.* at 768.

84. The Court equated support of religious institutions, such as elementary and secondary schools, with support of religion. *Id.* at 788. *See also supra* note 58.

85. Although the tax benefit was given to parents the year following a tuition payment, the

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tier of nonestablishment analysis precluded the need to conduct an excessive entanglement inquiry. Nonetheless, the Court noted that the political divisiveness which the tax deduction could cause made it highly suspect under a political entanglement inquiry.[86] Finally, the Court discounted any comparisons with the issues surrounding the church property tax exemption in *Walz v. Tax Commission*.[87]

With one exception,[88] in the twelve years following *Nyquist*, courts

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Court reasoned that the benefit still served as an incentive to keep one's child in a private school. Thus, with the state's blessings, benefits flowed through the parents to the private school. 413 U.S. at 793-94.

Justice Rehnquist disagreed. He contended that aid to individuals had always been on a different footing from direct aid to religious institutions and that the state's only intention was to equalize the costs to parents. *Id.* at 805 (Rehnquist, J., dissenting in part).

86. The Court believed that the state had a motive to escalate the initially modest package and thus increase the potential for political entanglement. Justice Powell stated:

> [W]e know from long experience with both Federal and State Governments that aid programs of any kind tend . . . to escalate in cost, and to generate their own aggressive constituencies. . . . [T]he State itself, concededly anxious to avoid assuming the burden of educating children now in private and parochial schools, has a strong motivation for increasing this aid. . . .

Id. at 797.

87. The *Nyquist* Court found three main distinctions from the property tax exemption approved in *Walz*. *See supra* notes 51-53 and accompanying text. First, unlike the *Walz* exemption, the *Nyquist* deduction enjoyed no historical acceptance. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 792 (1973). Also unlike the *Walz* exemption, the *Nyquist* deduction benefited a predominantly religious class. *Id.* at 794. Finally, the Court found the *Nyquist* deduction to have none of "the elements of a genuine tax deduction, such as for charitable contributions" and, therefore, the *Walz* neutrality test was inapplicable. *Id.* at 790 n.49.

The *Nyquist* Court did not define "genuine tax deduction," but the Internal Revenue Code offers guidance in its provision for a federal income tax deduction for charitable contributions. It states in pertinent part: . . . [T]he term "charitable contribution" means a contribution or gift to or for the use of. . . [a] corporation, trust, or community chest, fund or foundation . . . organized exclusively for religious, charitable, scientific, literary, or educational purposes. . . . I.R.C. § 170(c) (1982). The Internal Revenue Code definition precludes, therefore, payment for services received. *See* Hunter, *supra* note 56, at 538 n.64 (criticizing the *Nyquist* Court for failing to state in its comparison with the *Walz* exemption that the tuition deduction was incomparable to any charitable deduction since the latter is never available in return for a product or service). *See also* Wisconsin Dept. of Tax v. Belle City Malleable Iron Co., 258 Wis. 101, 106, 45 N.W.2d 68, 71 (1950) (stating that "a charitable contribution is a voluntary transfer of property . . . without thought or expectation of recompense, reward or rivate gain. . . ."); *infra* note 88 (describing mechanical elements of deduction).

88. Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978). The statute in *Roemer* was the same as the one challenged in *Mueller v. Allen*. *See supra* note 6. It provided income tax deductions for some educational expenses incurred by parents with children in private and public schools. *See supra* notes 7-9. The statute withstood establishment challenge in part because it benefited the parents of children in sectarian and nonsectarian private schools as well as parents with publicly educated children. 452 F. Supp. at 1320-22. Thus, the benefited class was not predominantly composed of those pursuing religious education, as in *Nyquist*. *See*

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uniformly rejected a variety of tax plans[89] conferring relief on parents of private school children. For example, in *Rhode Island Federation of Teachers v. Norberg*[90] the First Circuit, relying on *Nyquist*, held that a statute[91] granting parents of all elementary and secondary school students a personal income tax deduction for tuition,[92] textbook[93] and transportation[94] expenses violated the establishment clause.[95] In its consideration of the tuition deduction, the court found insignificant[96] the extension of the benefited class to include parents of public school students. The tuition deduction, therefore, was not neutral because the expenditures for tuition were incurred predominantly by private school parents.[97] Furthermore, because the textbook deduction covered instructional materials, assurance of the secular nature and continued secular use of these materials required government surveillance or auditing. Such measures would have excessively entangled the state in the affairs of the church.[98] Consequently, the entanglement factor dis-

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supra note 89. The court further emphasized that the statute in question provided a true tax deduction because it allowed a subtraction from the tax base, not from taxes owed. 452 F. Supp. at 1321. Thus, a benefit resulted only if the deduction moved the taxpayer into a lower tax bracket. The court's definition of a true tax deduction was, therefore, limited to the mechanics of tax deductions and did not reflect the requirement that charitable contributions be gratuitous. In *Roemer,* parents received education for their children in return for tuition, textbook and transportation expenditures. *But see supra* note 89.

89. *See, e.g.,* Public Funds for Pub. Schools v. Byrne, 444 F. Supp. 1228 (D.N.J. 1978) (tax deduction up to $1000 per child in private elementary or secondary school), *aff'd,* 590 F.2d 514 (3rd Cir. 1979); Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972) (tax credits to parents of private school students), *aff'd sub nom.* Grit v. Wolman, 413 U.S. 901 (1973); Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio) (gifts to parents of $90 per child in private school), *aff'd mem.,* 409 U.S. 808 (1972); Minnesota Civil Liberties Union v. Minnesota, 302 Minn. 216, 224 N.W.2d 344 (1974) (tax credits for educational costs to parents with children in nonpublic schools), *cert. denied,* 421 U.S. 988 (1975).

90. 630 F.2d 855 (1st Cir. 1980).

91. R.I. GEN. LAWS § 44-30-12(c)(2) (1980). Provisions of the statute are identical in pertinent part to the Minnesota statute upheld in *Mueller v. Allen*. *See supra* note 6.

92. 630 F.2d at 858. *See supra* note 7.

93. 630 F.2d at 861. *See supra* note 9.

94. 630 F.2d at 862. *See supra* note 8.

95. 630 F.2d at 863.

96. The court stated: "Absent a class having primarily secular characteristics, as found in *Walz* and presumed to exist in *Roemer*, it cannot be said that the advantages flowing from the statute to the parents of sectarian school students will be incidental to secular ends and effects. . . ." *Id.* at 861.

97. Ninety-four percent of the students attending Rhode Island's nonpublic and tuition-funded public schools in 1979 attended sectarian schools. *Id.* at 859.

98. The court emphasized that although the deduction would be taken by the parent, the sectarian school would undoubtedly control the choice of texts and instructional materials; conse-

tinguished the *Norberg* textbook provision from those approved in precedential textbook cases.[99] Finally, the transportation deduction passed constitutional scrutiny,[100] but it was not severable[101] from the other provisions.

Two years after *Norberg*, the Eighth Circuit in *Mueller v. Allen*[102] upheld a Minnesota statute[103] nearly identical to the one invalidated by the First Circuit. The *Mueller* court found the program to have the valid secular purpose of improving the quality of education for all children.[104] In contrast to the *Norberg* decision, however, the Eighth Circuit also approved the tuition, textbook and transportation deductions because their primary effect was the promotion of pluralistic education rather than religion.[105]

The court relied on the expansive scope of the benefited class[106] to discredit a primary effect challenge. Because the benefits extended to all parents with children in Minnesota elementary and secondary schools, the court reasoned that, as in *Walz*,[107] the neutrality requirement was satisfied. Plaintiffs failed to prove that public school parents benefited less than private school parents.[108] Furthermore, the *Mueller*

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quently, any surveillance that would begin with the parents would necessarily encompass the school. *Id.* at 862. *But see infra* notes 137-38 and accompanying text.

99. The court distinguished the Rhode Island textbook deduction from textbook loan programs approved by the Supreme Court which afford the state absolute control over the content of the books and their continued secular use. 630 F.2d at 861-62. *See* Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980); Wolman v. Walter, 433 U.S. 229 (1977); Board of Educ. v. Allen, 392 U.S. 236 (1968). *See also supra* note 51.

100. The court only alluded to the constitutionality of the provision in its pronouncement that "it could not be severed from the unconstitutional portions of the statute." 630 F.2d at 862. Judge Levin in his concurring and dissenting opinion was more direct when he stated that the transportation provision was, by itself, constitutional. *Id.* at 863 (Levin, J., concurring in part and dissenting in part).

101. The court concluded that the legislature would not have enacted the transportation provision alone. *Id.*

102. 676 F.2d 1195 (8th Cir.), *cert. granted,* 51 U.S.L.W. 3253 (U.S. Oct. 5, 1982) (No. 82-195).

103. MINN. STAT. ANN. § 290.09 (West Supp. 1982). *See supra* note 6.

104. 676 F.2d at 1198.

105. *Id.* at 1205.

106. The court stated "[T]he Minnesota statute has not singled out a class of citizens for special economic benefit. It is neutral on its face; and under the facts presented here, we cannot reject this facial neutrality as mere window dressing." *Id.* at 1204.

107. *See supra* note 55 and accompanying text.

108. Plaintiffs' statistics, obtained from the Minnesota Department of Education, indicated that in the 1979-80 school year 4.56% of the 90,954 private school pupils attended nonsectarian facilities. In the previous year, 3.71% of the 88,524 nonpublic school students had attended nonsectarian schools. 676 F.2d at 1198. Based on these figures, plaintiffs argued that 71% of the 2.4

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court contended that the deduction package was more closely analogous to tax deductions provided by the Internal Revenue Service for charitable contributions[109] than to the tax credits disallowed in *Nyquist*.[110]

The court found the transportation deduction permissible under *Everson*.[111] Similarly, it held the textbook deduction analogous to the allowance approved in *Board of Education v. Allen*.[112] Although the Supreme Court struck down grants of instructional materials in three cases,[113] the *Mueller* court rejected any comparisons because those instances involved substantial loans directly to the institutions.[114]

The tuition deduction presented the court with an admittedly more difficult analysis.[115] Because the Minnesota scheme did not guarantee a benefit to every eligible parent,[116] the court found that the benefits

million dollars in revenue the state would lose through the tuition deduction could be attributed to parents with children in religious schools. *Id.* at 1199. The tax commissioner, however, argued that the statistics were incomplete because they "fail[ed] to account for tax benefits running to taxpayers with dependents in public and nonsectarian private schools with ordinary tuition . . . textbooks . . . transportation . . . summer school and driver's education class tuition expenses." *Id.* The court agreed with the commissioner. *Id.* at 1205.

109. I.R.C. § 170(c) (1982). *See supra* note 89. *See also supra* notes 79 & 90 and accompanying text.

110. 413 U.S. 756 (1973). The court distinguished the statute in *Nyquist* which allowed deduction from adjusted gross income of an amount determined not in relation to what a parent actually paid in tuition, but rather in accordance with a set scale based on income level. *See supra* note 78. Thus, the *Mueller* court reasoned that the statute in *Nyquist* guaranteed a tax benefit, which operated as a tax credit. 676 F.2d at 1203.

111. 330 U.S. 1 (1947). *See supra* notes 29-31 and accompanying text.

112. 392 U.S. 236 (1968). *See supra* note 51 and accompanying text. The precedential value of *Allen* has been strengthened by the Court's continued acceptance of textbook provisions after adoption of the excessive entanglement theory. *See, e.g.,* Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975).

113. *See* Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Public Funds for Pub. Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), *aff'd mem.,* 417 U.S. 961 (1974).

114. Mueller v. Allen, 676 F.2d 1195, 1201 (8th Cir.), *cert. granted,* 51 U.S.L.W. 3253 (U.S. Oct. 5, 1982) (No. 82-195).

115. The court stated: "It is not without difficulty that we reach our decision . . . . [W]e are dealing with an indirect state subsidy of tuition which can be viewed 'as an incentive to parents to send their children to sectarian schools' . . . ." *Id.* at 1204 (quoting Sloan v. Lemon, 413 U.S. 825 (1973)).

116. A tax deduction is subtracted from a taxpayer's adjusted gross income, not from the taxes owed. BLACK'S LAW DICTIONARY 1310 (5th ed. 1979). The adjusted gross income determines an individual's tax bracket. Although individuals in a single bracket will be taxed at the same rate, a range of adjusted gross incomes appears in a single bracket. Thus, "whether a parent obtains a tax benefit depends upon whether the deduction is sufficient to move the taxpayer from a higher bracket to a lower one." 676 F.2d at 1204.

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conferred on religious institutions were more uncertain and diffused[117] than in *Nyquist*[118] or *Norberg*.[119] As a result, the provision primarily benefited the parents, not the educational institutions. Thus, along with the textbook and transportation provisions, the tuition provision withstood constitutional challenge at the second tier of the nonestablishment test.[120]

Outside the Eighth Circuit, a solid consensus has developed in opposition to providing indirect aid to parochial elementary and secondary schools through direct grants and tax benefits to parents of private school children.[121] The opposition is based on a clear understanding of the basic meaning of the establishment clause[122] of the first amendment and the Supreme Court's interpretation of the relation of that clause to sectarian education.[123]

The Supreme Court's three tier establishment test has been effectively reduced to two levels. The original criterion, that the legislation in question serve a secular purpose, has steadily diminished in importance since the Court first acknowledged in *Abington School District v. Schempp*[124] that a legislature may write a plausible secular purpose statement into any suspect legislation.[125] Furthermore, in the area of education, no measure that improves the quality of a child's schooling, public or private, seriously may be deemed lacking in social value.[126]

In *Mueller v. Allen*,[127] the Eighth Circuit correctly approved the tax deduction legislation at this first level of analysis because the secular purpose behind the statute was plausible. The legislation was designed to alleviate some of the financial burdens plaguing both public and private school parents and thus enable a healthy educational pluralism to

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117. 676 F.2d at 1204.

118. *See supra* notes 72-87 and accompanying text.

119. *See supra* notes 90-101 and accompanying text.

120. 676 F.2d at 1205.

121. *See supra* note 89 and accompanying text.

122. *See supra* notes 20, 21 & 32.

123. *See supra* notes 26-32 & 58-87 and accompanying text.

124. 374 U.S. 203 (1963).

125. *See supra* note 46. *See generally* Note, *supra* note 36, at 1179-80 (discussing decline of independent purpose test with incorporation into legislation of stated secular purpose, as in *Nyquist*).

126. Mueller v. Allen, 676 F.2d 1198, 1206 (8th Cir.), *cert. granted,* 51 U.S.L.W. 3253 (U.S. Oct. 5, 1982) (No. 82-195) (quoting Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part)).

127. 676 F.2d at 1195.

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continue.[128] Nevertheless, plausible purposes do not guarantee constitutionality.

In the past decade, the primary effect standard has emerged as the essence of establishment clause analysis.[129] When the *Mueller* legislation passes to this level of inquiry, the transportation and textbook deductions could avoid serious challenge. The tuition deduction, however, fails.[130]

The continued vitality of the Supreme Court's approval of transportation reimbursements in *Everson*[131] effectively precludes a successful attack on a transportation deduction. The law is equally clear in the area of textbook loans.[132] The instructional material component of the Minnesota textbook deduction may be questioned, however, because the Supreme Court has invalidated a number of direct loans to religious schools for secular materials.[133] The *Mueller* court contended that those cases were distinguishable because the deduction in *Mueller* was relatively small and directed to parents, not institutions.[134] The more convincing argument, however, is that auditing of materials bought by parents does not require the state to entangle itself in the affairs of the religious school.[135] Any governmental inquiry into the secular nature of a deduction would involve an audit of the individual claimant, not the educational facility to which a child is sent.[136] Thus, the textbook and transportation provisions justifiably passed establishment scrutiny.

In contrast to the transportation and textbook components, the tuition tax deduction cannot effectively be used solely for secular purposes. It is designed to allow parents to send their children to private schools, the majority of which are church-affiliated.[137] The tuition

128. *Id.* at 1198. The court agreed that the "manifest purpose of the statute is to provide all taxpayers a benefit which will operate to enhance the quality of education . . . ." *Id.*

129. Note, *supra* note 38, at 1190. *See also supra* note 56 (discussing the weaknesses of the excessive entanglement test).

130. *See infra* notes 136-53 and accompanying text.

131. 330 U.S. 1 (1947). The Supreme Court has not overturned the decision in 35 years.

132. *See supra* note 112.

133. *See supra* note 113 and accompanying text.

134. 676 F.2d at 1202.

135. *Id.* (quoting from the district court's opinion, 514 F. Supp. 998, 1003 (D. Minn. 1981)).

136. Even if the Court accepted the argument that an audit of a parent would lead to surveillance of the educational facility, it is unlikely that the Court would invalidate the program on the excessive entanglement theory alone. *See supra* note 56.

137. 676 F.2d at 1198. According to figures supplied by the Minnesota Department of Educa-

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charged at parochial institutions supports not only the secular aspects of education, but also the religious elements. Moreover, the Supreme Court has acknowledged that the religious experience permeates the lower levels of sectarian education.[138]

The *Mueller* court failed in its attempt to pass the tuition deduction section of the statute through the primary effect test by drawing comparisons between the provision and the church property exemption approved in *Walz v. Tax Commission*.[139] First, the *Walz* decision was supported by substantial and historically accepted federal and state action.[140] No similar historical argument supports tuition deductions. Second, church property under New York law assumed an equal position with educational and charitable property.[141] To contend, for example, that a deduction for public school driver education tuition is comparable to deduction for full time parochial school tuition is questionable. *Walz* does not represent the theory that superficial expansion of the breadth of a benefited class will legitimize an otherwise religion-advancing statute.[142] Third, drawing a comparison between the tuition deduction and deductions routinely granted by the Internal Revenue Service for donations to charitable organizations is inappropriate because parents are receiving a service for their tuition; payment of tuition for private education is not a gift.[143] Finally, the acceptance, not the rejection, of tuition tax deductions would lead to the *Walz* Court's fear of excessive administrative entanglement and political divisiveness.[144]

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tion and introduced at trial, 4.56% of the students attending private schools were enrolled in nonsectarian institutions.

138. *See supra* note 58.

139. 397 U.S. 664 (1970). *See supra* notes 53 & 107 and accompanying text.

140. *See supra* note 52.

141. *See supra* notes 51 & 53 and accompanying text.

142. The *Walz* Court strongly emphasized that religious property did not dominate the exempted class. *See supra* note 53. *See also supra* note 96.

143. 676 F.2d at 1205. For a discussion of the Internal Revenue Code definition of a deduction for a charitable contribution, *see supra* note 87.

144. Unlike textbooks and transportation, tuition represents a nonseverable element of a child's religious education. As the Court stated in *Nyquist*, when a provision applies broadly to tuition, there is no attempt "to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 783 (1972) (quoting Lemon v. Kurtzman, 403 U.S. 602, 613 (1971)). Nonetheless, any attempt to make such a determination would necessarily lead the government to excessive surveillance of the school and entanglement of its affairs. *See supra* notes 56 & 66 and accompanying text.

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The Eighth Circuit also relied on the indirect nature of the aid to discount charges of religious advancement.[145] According to the decision in *Nyquist*,[146] however, making parents the conduits of the aid does not prevent the religious educational facility from ultimately receiving a substantial benefit as a result of steady or increased enrollment.[147] The Supreme Court has yet to adopt a "parent benefit" theory to approve indirect aid to religious institutions.[148] Furthermore, while the deduction does not guarantee a savings to every eligible parent[149] as the *Nyquist* provision did, certainly those parents with the heaviest educational expenses are most likely to benefit from the deduction.[150] Although the text of the law refers to all parents,[151] the primary benefit flows to the largest tuition-paying class, the sectarian school parents.[152] As a result, the tuition tax deduction promotes religious education and should fail the primary effect[153] tier of establishment clause inquiry.

The *Mueller* court reached a conclusion inconsistent with the relevant holdings of the Supreme Court.[154] The approval of tax benefits for tuition-paying parents of sectarian school children is startling in light of the consistency of decisions condemning parent benefit statutes.[155] Therefore, it is doubtful that the Minnesota statute will withstand Supreme Court scrutiny.

M.E.K.

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145. 676 F.2d at 1202.

146. 413 U.S. 756 (1972). *See supra* notes 72-87 and accompanying text.

147. "By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid . . . are certainly unexceptional, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."

413 U.S. at 783. *See supra* note 89 and accompanying text.

148. *Cf. supra* notes 34 (discussing the "child benefit" theory) & 89 (citing cases in which the passage of a benefit to parents was inconsequential to the outcome of constitutional analysis).

149. *See supra* note 116.

150. *See supra* notes 76 & 116.

151. *See supra* note 6.

152. *See supra* note 137. *See also* MINN. STAT. ANN. § 120.06 (West Supp. 1982) (providing tuition-free public education for children within district).

153. *See supra* notes 44-48 and accompanying text.

154. *See supra* notes 26-87 and accompanying text.

155. *See supra* notes 89-101 and accompanying text.

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The Right to Counsel in Pretrial Custodial Identification Proceedings

People v. Bustamante, 30 Cal. 3d 88, 634 P.2d 927, 177 Cal. Rptr. 576 (1981)

In *People v. Bustamante*,[1] the California Supreme Court relied on the state constitution[2] to extend an accused's right to counsel to preindictment[3] custodial lineups.[4]

Police officers arrested defendant on suspicion of robbery[5] and other crimes.[6] While defendant was in custody, a witness to the robbery positively identified him in a preindictment lineup. The witness reaffirmed his identification at trial. Although defendant had requested counsel

1. 30 Cal. 3d 88, 634 P.2d 927, 177 Cal. Rptr. 576 (1981).

2. Cal. Const. art. I, § 15 states:

> The defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, to be personally present with counsel, and to be confronted with the witnesses against the defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel.

A series of recent California cases have interpreted this provision of the California Constitution independently of United States Supreme Court decisions interpreting parallel provisions of the federal constitution. *See, e.g.,* People v. Chavez, 26 Cal. 3d 334, 605 P.2d 401, 161 Cal. Rptr. 762 (1980).

3. For purposes of this Comment, the term "preindictment" encompasses the period prior to the filing of an information for felony prosecutions and the filing of a formal complaint in misdemeanor prosecutions. The California Supreme Court in *Bustamante* similarly defined "preindictment." 30 Cal. 3d at 91 n.1, 634 P.2d at 929, 177 Cal. Rptr. at 578. For statutes defining the use of an indictment or complaint, see, *e.g.,* Cal. Penal Code §§ 737, 740 (Deering 1982); Fed. R. Crim. P. 3, 7. *See also infra* note 54.

4. Lineups, showups, and photograph displays are the custodial identification procedures most frequently used in criminal investigations and prosecutions. In lineups and showups the police present the suspect to the witness in person. See *infra* note 31 for a brief discussion of lineup and showup procedures.

The photograph display procedure entails a presentation by the police of an array or "lineup" of several photographs from which the witness identifies the suspect. For a discussion of the dangers and constitutional safeguards of the various identification procedures, see Grano, Kirby, Biggers & Ash, *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?,* 72 Mich. L. Rev. 717 (1974). For current developments in case law on the right to counsel at pretrial identification proceedings, see N. Sobel, Eyewitness Identification (1981); Note, *The Right to Counsel: Attachment Before Criminal Judicial Proceeding?,* 47 Fordham L. Rev. 810 (1979).

5. Defendant's appeal to the California Supreme Court focused solely on his robbery conviction. 30 Cal. 3d at 94, 634 P.2d at 930, 177 Cal. Rptr. at 579.

6. The State ultimately charged defendant with robbery, burglary, theft of a gun, receipt of stolen property, possession of a firearm, possession of cocaine, and possession of concentrated cannabis. *Id.* at 93, 634 P.2d at 930, 177 Cal. Rptr. at 579.

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prior to the lineup, none was provided until sometime after the identification proceeding.[7]

At trial, the defense moved to exclude the witness's in-court identification testimony from evidence, contending that it was based on a custodial lineup during which the State violated defendant's right to counsel.[8] The trial court denied the motion and the jury subsequently convicted defendant.[9] The defendant appealed the conviction[10] on the ground that the trial court erred in admitting the identification testimony.[11] In a plurality decision, the California Supreme Court[12] reversed the conviction and *held*: Under the California Constitution, an accused has a right to assistance of counsel at a preindictment lineup.[13]

The sixth amendment to the United States Constitution, ratified in 1791, guarantees criminal defendants the right to assistance of counsel in federal prosecutions.[14] In *Gideon v. Wainwright*,[15] the United States

7. *Id.* at 93, 634 P.2d at 930, 177 Cal. Rptr. at 579. The facts do not specify the point at which the defendant first received counsel's assistance.

8. *Id.* at 93, 634 P.2d at 930, 177 Cal. Rptr. at 579. Prior to trial, the defense moved to challenge the witness' lineup identification on the same grounds. The trial court denied the motion. *Id.* The victim of the crime identified the defendant at the preliminary hearing, and repeated this identification at trial. The defendant did not object to the victim's identification testimony, however, because there were no due process violations at the preliminary hearing identification. *Id.*

9. *Id.* In addition to the robbery conviction, the jury convicted defendant of receiving stolen property, being an ex-felon in possession of a firearm, possessing cocaine, and possessing concentrated cannabis. The jury acquitted defendant on the charges of burglary and theft of a stolen gun. *Id.*

10. People v. Bustamante, 110 Cal. App. 3d 981, 168 Cal. Rptr. 298 (1980).

11. The absence of counsel at a police lineup conducted after June 12, 1967, is reversible error. Any suspect participating in a custodial lineup after the Supreme Court decisions of United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), is entitled to counsel as a matter of right. *See also infra* note 33 and accompanying text.

12. The California Supreme Court sat en banc.

13. 30 Cal. 3d at 101-02, 634 P.2d at 935-36, 177 Cal. Rptr. at 584-85.

14. In 1789 Congress passed the sixth amendment with almost no debate. Rachow, *The Right to Counsel: English and American Precedents,* 11 WM. & MARY Q. 1, 21-26 (1954). The sixth amendment reads in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI, § 1.

Historically, the right to counsel was a procedural right available to defendants in selected criminal and capital cases in England. *See generally* Note, *An Historical Argument for the Right to Counsel During Police Interrogation,* 73 YALE L.J. 1000, 1018 n.99 (1964). Historians and com-

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Supreme Court extended the specific guarantees of the sixth amendment to the states through the due process clause of the fourteenth amendment.[16] In addition to the sixth and fourteenth amendment safeguards, criminal defendants at the state level are guaranteed the right

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mentators on English law agree that a defendant prosecuted in a criminal trial for a felony or a lesser wrong could receive legal assistance at pleadings of exception and at other intervals during trial. Case law, statutes, and Yearbooks do not clearly define the stages of the criminal trial at which the assistance of counsel attached.

The criminal defendant's right to counsel was preserved in common law England as an absolute right. In sixteenth century England, however, courts began to limit the assignment of counsel by establishing a distinction between fact and law on issues in a criminal trial. Courts began to restrict the right to assistance of counsel to defendants pleading matters of law and denied advice of counsel on issues or demonstrations of fact. Frequently courts narrowly construed what constituted questions of law, further limiting an accused's right to counsel. Jaeger, *The Right to Counsel During Police Interrogation: The Aftermath of Escobedo,* 53 CALIF. L. REV. 337, 347 n.57 (1965). English courts denied defendants accused of treason the assistance of counsel. The use of witnesses to introduce and illustrate factual issues developed concurrently with the right to counsel. The courts maintained that witness confrontations and accusations of treasonous conduct were matters of fact, not law, and thus the defendant was not entitled to counsel. *See* Russel's Case, 9 How. St. Tr. 577 (1683); Raleigh's Case, 1 How. St. Tr. 236 (1603). For a history of the development of the right to counsel in common law England, see generally 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 244-72 (1883); 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 607-20 (1936 ed.).

American courts did not adhere to the distinction articulated in English statutes and cases, and thus, did not similarly restrict the right to counsel. Eleven of the thirteen colonies abolished the dichotomic application of right to counsel either expressly or by implication in colonial statutory provisions or constitutions granting the accused the right to the assistance of counsel: Connecticut, Delaware, Georgia, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, and Vermont. *See* Note, *supra*, at 1030-31.

15. 372 U.S. 335 (1963).

16. The *Gideon* Court stated: "[A] provision of the Bill of Rights which is fundamental and essential to a fair trial is made obligatory upon the States by the Fourteenth Amendment." *Id.* at 342. The pertinent portion of the fourteenth amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Previously, in Powell v. Alabama, 287 U.S. 45 (1932), the Supreme Court recognized that indigent defendants in capital cases were entitled to assistance of counsel at trial and at stages prior to trial. The Court relied on the due process clause of the fourteenth amendment rather than the sixth amendment right to counsel guarantee. *See infra* notes 19-24 and accompanying text. In 1938, the Court applied the sixth amendment right to counsel to federal felony prosecutions. Johnson v. Zerbst, 304 U.S. 458 (1938). The *Johnson* Court, however, refused to extend the right to counsel to state felony prosecutions. In Betts v. Brady, 316 U.S. 455 (1942), the Court reaffirmed *Johnson* and held that the "due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment." *Id.* at 461-62. The *Betts* Court interpreted the due process clause narrowly and concluded that counsel's assistance at

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to counsel by parallel state constitutional provisions.[17] Although the

state criminal prosecutions was a matter of state law and not a right protected by the federal constitution. *Id.*

In 1963, the Supreme Court overruled *Betts* in Gideon v. Wainwright, 372 U.S. 335 (1963). *See supra* notes 15-16 and accompanying text. By granting indigent defendants the right to counsel in all state criminal prosecutions, the Court in *Gideon* determined that the due process clause of the fourteenth amendment fully incorporated the sixth amendment guarantee of the right to counsel. *See generally* C. WHITEBREAD, CRIMINAL PROCEDURE 514-19 (1980).

17. By 1789, the states had enacted statutes and ordinances expressly granting defendants the assistance of counsel at criminal trials. North Carolina passed a statute providing that "every person accused of any crime or misdemeanor whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense, as well to facts as to law. . . ." 1 N.C. REV. LAWS 225 (1777) (Iredell & Martin eds. 1804), *cited in* Note, *supra* note 14, at 1029. In addition, several other states enacted similar provisions granting a defendant the right to counsel in felony as well as misdemeanor prosecutions. *See* S.C. PUB. LAWS 25 (1731) (Grimke ed. 1790); 2 Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 392, 398-99 (1796). Delaware, New Jersey, and Pennsylvania relied on the Penn Charter of 1701 to grant defendants the right to counsel in criminal trials, explicitly extending the common law right: "[A]ll criminals shall have the same Privileges of Witness and Council as their Prosecutors." PENN CHARTER art. V (1701), *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS AND ORGANIC LAWS 3079 (Thorpe ed. 1909) [hereinafter cited as THORPE]. *See also* DEL. CONST. art. XXIV (1776), *reprinted in* 1 THORPE, *supra*, at 566; N.J. CONST. art. XVI (1776), *reprinted in* 5 THORPE, *supra*, at 2597. New Hampshire, Massachusetts, Pennsylvania, and Vermont enacted constitutional provisions that included the assistance of counsel as part of an accused's right to defend himself in a criminal trial: "Every subject shall have a right . . . to be fully heard in his defence by himself, and counsel." N.H. CONST. pt. 1, art. XV (1784), *reprinted in* 4 THORPE, *supra*, at 2455. *See also* MASS. CONST. pt. 1, art. XII (1780), *reprinted in* 3 THORPE, *supra*, at 1891; PENN. CONST. art. IX (1776), *reprinted in* 5 THORPE, *supra*, at 3083; VT. CONST. ch. I, § 10 (1777), *reprinted in* 6 THORPE, *supra*, at 3741. The Maryland Constitution of 1776 simply provided that defendants in criminal prosecutions are entitled to counsel. MD. CONST. art. XIX, *reprinted in* 3 THORPE, *supra*, at 1688. New York's constitution explicitly guaranteed that "in every trial, impeachment or indictment for crimes or misdemeanors, the party impeached or indicted shall be allowed counsel, as in civil actions." N.Y. CONST. art. XXXIV (1777), *reprinted in* 5 THORPE, *supra*, at 2635.

After the states ratified the United States Constitution, Georgia and Rhode Island drafted constitutional provisions ensuring the accused the right to counsel. The Georgia constitution of 1798 provided that "no person shall be debarred from advocating or defending himself or counsel, or both." GA. CONST. art. III, § 8, *reprinted in* 2 THORPE, *supra*, at 799. Rhode Island modified its Declaration of Rights to include a right to counsel provision similar to that of the sixth amendment. R.I. REV. PUB. LAWS 80-81, § 6 (1798). *See generally* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 18-22 (1955); Note, *supra* note 14, at 1055-57.

Today, 49 states have constitutional provisions entitling a defendant to the assistance of counsel in criminal prosecutions. Alaska, Iowa, Michigan, Minnesota, New Jersey, Rhode Island and West Virginia adopted wording similar to that of the sixth amendment. *See, e.g.,* ALASKA CONST. art. I, § 11 ("In all criminal prosecutions the accused . . . is entitled to have the assistance of counsel for his defense.") *See also* IOWA CONST. art 1, § 10; MICH. CONST. art. 1, § 20; MINN. CONST. art. 1, § 6; N.J. CONST. art. 1, ¶ 10; R.I. CONST. art. 1 § 10; W. VA. CONST. art. 3, § 14. In 37 states, the accused is entitled to be defended by counsel, by himself, or by both. *See* ALA. CONST. art. 1, § 6; ARIZ. CONST. art. 2, § 24; ARK. CONST. art. 2, § 10; CAL. CONST. art. 1, § 15; COLO. CONST. art. 2, § 16; CONN. CONST. art. 1, § 8; DEL. CONST. art. 1, § 7; FLA. CONST. art. 1,

right to counsel is firmly established in both state and federal jurisdictions, courts disagree on the stage of the criminal proceeding at which the right must attach.[18]

In 1932, in *Powell v. Alabama*,[19] the Supreme Court recognized that a defendant's right to a fair trial is contingent upon the extension of his right to counsel beyond the boundaries of the trial itself.[20] Although the *Powell* Court specifically held that an indigent offender in a capital case is entitled to a court-appointed attorney,[21] the Court additionally asserted that a defendant's right to counsel encompasses pretrial proceedings[22] from arraignment to the beginning of trial.[23] In reaching

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§ 16; IDAHO CONST. art. 1, § 13; ILL. CONST. art. 1 § 8; IND. CONST. art. 1, § 13; KAN. CONST. BILL OF RTS., § 10; KY. CONST. § 11; ME. CONST. art. 1, § 6; MASS. CONST. § 13; MISS. CONST. art. 3, § 26; MO. CONST. art. 1, § 18(a); MONT. CONST. art. 2, § 24; NEB. CONST. art. 1, § 11; NEV. CONST. art. 1, § 8; N.H. CONST. pt. 1, art. 15; N.M. CONST. art. 2, § 14; N.Y. CONST. art. 1, § 6; N.D. CONST. art. 1, § 13; OHIO CONST. art. 1, § 10; OKLA. CONST. art. 2, § 20; OR. CONST. art. 1, § 11; PA. CONST. art. 1, § 9; S.C. CONST. art. 1, § 14; S.D. CONST. art. 6, § 7, TENN. CONST. art. 1, § 9; TEX. CONST. art. 1, § 10; UTAH CONST. art. 1, § 12; VT. CONST. ch. 1, art. 10; WASH. CONST. art. 1, § 22; WIS. CONST. art. 1, § 7; WYO. CONST. art. 1, § 10.

Five state constitutions have notably different provisions for the right to counsel. GA. CONST. art. 1, § 2-111 ("a defendant is to have the privilege and benefit of counsel"); HAWAII CONST. art. 1, § 11 ("right to assistance of counsel and, if the accused is indigent, the appointment of counsel"); LA. CONST. art. 1, § 13 (same); MD. CONST. DECL. OF RTS., art. 21 ("an accused is to be allowed counsel"); N.C. CONST. art. 1, § 23 ("the accused has the right to counsel").

In Blue v. State, 558 P.2d 636 (Alaska 1977), and People v. Jackson, 39 Mich. 323, 217 N.W.2d 22 (1974), the Alaska and Michigan Supreme Courts, by relying on their state constitutional provisions, granted defendants counsel in state criminal prosecutions at stages in which the United States Supreme Court, in Kirby v. Illinois, 406 U.S. 682 (1972), did not require counsel. *See* ALASKA CONST. art. I, § 11; MICH. CONST. art. 1, § 20. *See also supra* notes 47-52 and accompanying text.

Virginia is the only state that safeguards a criminal defendant's right to counsel by statute, *see* VA. CODE §§ 19.2-157 to .2-163 (1950 & Supp. 1982), and by judicial interpretation, *see, e.g.*, Timmons v. Peyton, 360 F.2d 327 (4th Cir. 1966); Noe v. Cox, 320 F. Supp. 849 (W.D. Va. 1970).

18. *See infra* notes 19-61 and accompanying text.

19. 287 U.S. 45 (1932). In *Powell*, defendants charged with rape did not have legal assistance at their arraignment. On the morning of the trial the judge designated counsel to represent defendants, although the record indicated the court-appointed attorney exerted at most casual efforts in representing the defendants. The jury found defendants guilty of rape and sentenced them to death. The United States Supreme Court reversed on the ground that the state denied the defendant a fair trial and right to counsel in violation of the fourteenth amendment. *Id.* at 52-56.

20. *Id.* at 57.

21. *Id.* at 71. The *Powell* Court held:

> [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law. . . .

Id.

22. Pretrial proceedings include arraignment, *see, e.g.*, Hamilton v. Alabama, 368 U.S. 52

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this conclusion, the Court reasoned that these stages constitute a "critical period" of the adversary criminal process.[24]

Subsequently, in *Hamilton v. Alabama*,[25] the Warren Court, relied on the *Powell* opinion to hold that a defendant's right to counsel attaches at "any critical stage"[26] in the criminal proceeding. Thereafter, state and federal courts frequently applied the critical stage test to grant counsel at arraignments,[27] preliminary hearings,[28] and custodial

(1961); Salty v. Adams, 465 F.2d 1023 (2d Cir. 1972); McLean v. Maxwell, 2 Ohio St. 2d 226, 208 N.E.2d 139 (1965), preliminary hearing, *see, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970); United States v. Pate, 430 F.2d 639 (7th Cir. 1970); State v. Owens, 391 S.W.2d 248 (Mo. 1965), and custodial interrogation, *see, e.g.*, Massiah v. United States, 377 U.S. 201 (1964); United States *ex rel.* Dickerson, 430 F.2d 462 (3d Cir. 1970); State v. Alford, 98 Ariz. 124, 402 P.2d 551 (1965).

23. 287 U.S. at 57. *Powell* firmly established the necessity of counsel in a pretrial context: "[The accused] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Id.* at 69. The *Powell* Court recognized that preparation of a defendant's case during the pretrial stages would ultimately affect the defendant's right to a fair trial. The delay or denial of appointing an attorney before trial would "amount to a denial of effective and substantial aid in that regard." *Id.* at 53. Later cases shared the *Powell* Court's concern that an inadequately prepared defense would derrogate an accused's right to a fair trial. *See, e.g.*, White v. Maryland, 373 U.S. 59 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); United States *ex rel.* Reed v. Anderson, 461 F.2d 739 (3d Cir. 1972).

24. The Supreme Court defined the "critical period" of criminal proceedings as "the time of [the defendants'] arraignment and the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important. . . . [Defendants are] as much entitled to such aid during that period as at the trial itself." 287 U.S. at 57.

25. 368 U.S. 52 (1961).

26. The *Hamilton* Court reasoned that what happens in a "critical stage of a criminal proceeding . . . may affect the whole trial. Available defenses may be irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." *Id.* at 54.

The Supreme Court has developed a two-part test to determine whether a specific element in a criminal prosecution constitutes a "critical stage:" whatever occurs at that particular stage must affect the whole trial; jeopardizing the defendant's right to a fair trial; and counsel's assistance during that particular stage must have the capacity to help ensure procedural fairness to the defendant. *See generally* C. WHITEBREAD, *supra* note 16, at 521.

In *Hamilton*, the Court determined that arraignment constitutes a critical stage in Alabama criminal proceedings. The Court reasoned that if the Alabama defendant fails to plead his defenses at arraignment, they are waived for the remainder of the prosecution. ALA. CODE tit. 15, § 279 (1959 & Supp. 1973) (Alabama criminal code in effect at the time the Supreme Court decided *Hamilton*).

27. *See, e.g.*, Saltys v. Adams, 465 F.2d 1023 (2d Cir. 1972); Tucker v. State, 42 Ala. App. 174, 157 So. 2d 229 (1963); State v. Morrocco, 2 Conn. Cir. Ct. 568, 203 A.2d 161 (1964); People v. Combs, 19 A.D.2d 639, 241 N.Y.S.2d 104 (1963); McLean v. Maxwell, 2 Ohio St. 2d 226, 208 N.E.2d 139 (1965); Moorer v. State, 244 S.C. 102, 135 S.E.2d 713, *cert. denied*, 379 U.S. 860 (1964).

28. Coleman v. Alabama, 399 U.S. 1 (1970). *See, e.g.*, White v. Maryland, 373 U.S. 59 (1963); United States v. Pate, 430 F.2d 639 (7th Cir. 1970); Kemplen v. Maryland, 428 F.2d 169 (4th Cir. 1970); Freeman v. State, 87 Idaho 170, 391 P.2d 542 (1964); People v. Morris, 30 Ill. 2d

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interrogations.[29]

In 1967, in *United States v. Wade*,[30] the Supreme Court held that postindictment lineups[31] constituted a "critical stage"[32] in federal crim-

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406, 197 N.E.2d 433 (1964); State v. Young, 194 Kan. 242, 398 P.2d 584 (1965); Commonwealth v. O'Leary, 347 Mass. 387, 198 N.E.2d 403 (1964); State v. Owens, 391 S.W.2d 248 (Mo. 1965); Rainsberger v. State, 81 Nev. 92, 399 P.2d 129 (1965); Sanders v. Cox, 74 N.M. 524, 395 P.2d 353, *cert. denied,* 379 U.S. 978 (1965); Pettit v. Rhay, 62 Wash. 2d 515, 383 P.2d 889 (1963); Sparkman v. State, 27 Wis. 2d 92, 133 N.W.2d 776 (1965).

29. *See* Massiah v. United States, 377 U.S. 201 (1964) (right to counsel should " 'apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse.' " *See also* Brewer v. Williams, 430 U.S. 387 (1977); Escobedo v. Illinois, 378 U.S. 478 (1964); Spano v. New York, 360 U.S. 315 (1959); United States *ex rel.* Dickerson v. Rundel, 430 F.2d 462 (3d Cir. 1970); Brown v. Crouse, 425 F.2d 305 (10th Cir. 1970); State v. Alford, 98 Ariz. 124, 402 P.2d 551 (1965); People v. White, 233 Cal. App. 2d 765, 43 Cal. Rptr. 905 (1965); Harris v. State, 162 So. 2d 262 (Fla. 1964); Carson v. Commonwealth, 382 S.W.2d 85 (Ky. 1964), *cert. denied,* 380 U.S. 938 (1965); Johnson v. State, 238 Md. 140, 207 A.2d 643 (1965); State v. Lanzo, 44 N.J. 560, 210 A.2d 613 (1965); State v. Neely, 239 Ore. 487, 398 P.2d 482 (1965); Commonwealth v. Patrick, 416 Pa. 437, 206 A.2d 295 (1965); Cooper v. Commonwealth, 205 Va. 883, 140 S.E.2d 688 (1965). *See generally* Note, *The Pretrial Right to Counsel,* 26 STAN. L. REV. 399 (1974); Note, *The State Responses to* Kirby v. United States, 1975 WASH. U.L.Q. 423.

30. 388 U.S. 218 (1967). In *Wade*, police arrested defendant for bank robbery after an indictment had been returned. Prior to trial, federal agents directed defendant to participate in a lineup with five or six other persons. Each member of the lineup wore strips of tape on their faces, similar to those allegedly worn by the robbers, and were ordered to say "put the money in the bag." Both witnesses positively identified defendant. Although the court had appointed counsel to represent defendant, the attorney was not present at the pretrial lineup. At the trial, the witnesses reconfirmed their positive identification of defendant. *Id.* at 220.

31. Lineups and showups are the two types of custodial identification procedures. In a showup, the police present the lone suspect to the witness for identification. Showups are either arranged or accidental. N. SOBEL, *supra* note 4, at §§ 2-15 to -21. In a proper lineup or "identification parade," police direct the suspect and five or six other persons of similar height, age, and general appearance to line up or parade before witness. Lineups are most often used in cases of robbery and rape. The lineup has become a means frequently employed by the police to "provide them with fairly strong evidence of identity on which to proceed with their investigations and to base an eventual prosecution." Williams & Hammelman, *Identification Parades, Part I,* 1963 CRIM. L. REV. 479, 480. The Senate exemplified the popularity of eyewitness identification in its committee hearings on the Omnibus Crime Control and Safe Streets Act of 1968, when it described eyewitness identification as "an essential prosecutorial tool." S. REP. No. 1097, 90th Cong., 2d Sess. 53 (1968), *cited in* Levine & Tapp, *The Psychology of Criminal Identification: The Gap from* Wade *to* Kirby, 121 U. PA. L. REV. 1079, 1082 (1973). *See generally* N. SOBEL, *supra* note 4; P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965).

The development of a defendant's rights in showup identification procedures has been similar to that of the lineup except the courts usually assume a vigorous position against the use of a showup as a custodial identification method. *See, e.g.,* Stovall v. Denno, 388 U.S. 293 (1967); People v. Anderson, 389 Mich. 155, 205 N.W.2d 461 (1973). For an overview of the development of the rights of the accused in showups, see generally Grano, *supra* note 4; Pulaski, Neil v. Biggers: *The Supreme Court Dismantles the* Wade *Trilogy's Due Process Protection,* 26 STAN. L. REV. 1097 (1974).

32. The *Wade* Court described the pretrial identification confrontation as critical because

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inal prosecutions during which the accused must be afforded the right to counsel.[33] The Court reasoned that the dangers inherent in lineup

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"the results might well settle the accused's fate and reduce the trial itself to a mere formality." 388 U.S. at 224. The prejudicial effect that a pretrial custodial lineup has on the trial rests on the "common experience that, once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may . . . for all practical purposes be determined there and then before the trial." Williams & Hammelman, *supra* note 31, at 482.

The Court distinguished pretrial lineups from other "preparatory step[s] in the gathering of the prosecutor's evidence." 388 U.S. at 227. The Court held counsel's presence to be unnecessary during such evidence-gathering procedures as taking blood samples, *see* Schmerber v. California, 384 U.S. 757 (1966); fingerprinting, *see* Woods v. United States, 397 F.2d 156 (9th Cir. 1968); taking photographs of the accused, *see* Sandoval v. State, 172 Colo. 383, 473 P.2d 722 (1970); and physical examination and measurement of the accused, *see* State v. Hughes, 244 La. 774, 154 So. 2d 395 (1963). These identification methods, reasoned the Court, are based on scientific techniques with limited variables; defense counsel could accurately reconstruct the given procedure at trial and could effectively cross-examine witnesses about it. The Court concluded that "[these procedures] are not critical stages since there is minimal risk that . . . [defendant's] counsel's absence at such stages might derrogate from his right to a fair trial." 388 U.S. at 227-28.

33. Justice Brennan argued that the Court must "scrutinize any pretrial confrontation" to assess whether defendant needs counsel to preserve his fifth and sixth amendment rights. 388 U.S. at 227. The Court based its holding on the "principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derrogate from the accused's right to a fair trial." *Id.* at 226.

In addition to extending the right to counsel at postindictment lineups, the *Wade* Court announced an exclusionary sanction to be imposed whenever a defendant's right to counsel at pretrial lineups has been violated. On cross-examination, the *Wade* defendant's counsel revealed that the witnesses previously identified defendant at an uncounseled lineup. Defense counsel sought to strike the in-court identification testimony of the bank witnesses, alleging that it was based on the uncounseled lineups. *Id.* at 239-40. The Court held that identifications resulting from improperly conducted pretrial lineups are inadmissible as evidence at trial. In addition, the Court held that in-court identification testimony based on improper lineups could be excluded. In establishing the exclusionary sanction, the *Wade* Court recognized that pretrial lineups are often used by the prosecution to "crystallize" the witness' memory for later identification of defendant. The Court, however, refused to establish an automatic exclusionary rule for in-court identifications based on uncounseled lineups. *Id.* at 240.

To lessen the severity of the exclusionary sanction, the *Wade* Court employed the independent source test established by the Supreme Court in Wong Sun v. United States, 371 U.S. 471, 488 (1963). 388 U.S. at 240-41. The Court held that if the State could "establish by clear and convincing evidence" that the in-court identification was based on observations independent of the unconstitutional lineups, then the in-court identification would be admitted into evidence. *Id.* at 240. The Supreme Court enumerated several factors useful in determining whether the in-court identification has a source independent of the illegal pretrial lineup, including:

> the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to

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identifications[34] may seriously jeopardize the accused's right to a fair trial.[35] Counsel present at the identification proceeding[36] could detect suggestive actions,[37] avoid the risks of mistaken identification,[38] and

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> consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.

Id. at 241 (footnote omitted).

In a companion case, Gilbert v. California, 388 U.S. 263 (1967), the Supreme Court automatically excluded the in-court identification of eyewitnesses, determining that the identification was the direct result of an improper pretrial lineup. Upon direct examination of the witnesses, the State demonstrated that these witnesses had previously identified the defendant at a post-indictment lineup at which counsel was absent. The Court determined that the in-court identification was the "direct result of the illegal lineup 'come at by exploitation of [the primary] illegality.' " 388 U.S. at 272-73 (quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963)). The Court in *Gilbert* determined that evidence of an unconstitutional pretrial lineup identification is not admissible in a state criminal trial.

The Court held further that evidence of an illegal pretrial lineup must be excluded per se from the State's case-in-chief. In reaching its holding, the Court reasoned that in such a situation the uncounseled pretrial identification bolstered the in-court identification and the State should not be afforded an opportunity to establish alternative sources for the irreparably tainted in-court identification. *Id.* at 273.

34. Justice Brennan reasoned that lineups are inherently dangerous and threaten a defendant's right to a fair trial:

> The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. . . . A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. . . .

Moreover,

> [i]t is a matter of common experience that, once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may . . . for all practical purposes be determined there and then, before the trial.

388 U.S. at 228-29 (footnote omitted).

35. *See supra* notes 23 & 26.

36. The presence of counsel at lineups would eliminate or reduce the risks of suggestion and abuse, ensure defendant's right to confront his accusors, and protect defendant's right to a fair trial by enabling counsel to effectively cross-examine witnesses and reconstruct the lineup procedure in court. N. SOBEL, *supra* note 4, at §§ 2-21 to -24. *See* United States v. Wade, 388 U.S. 218, 229-38 (1967); Pointer v. State, 380 U.S. 400, 404-06 (1965); Levine & Tapp, *supra* note 31, at 1081-87, 1124-25; Note, *The Pretrial Right to Counsel, supra* note 29, at 399; Note, *The State Responses to* Kirby v. United States, *supra* note 29, at 423. For a discussion on the limited and ineffective role performed by counsel at lineups, see Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification,* 29 STAN. L. REV. 969 (1977).

37. Factors contributing to the suggestive nature of lineups include: the witness' knowledge that one of the persons in the lineup is the suspect; the intentional contrast of physical characteristics among the participants in the lineup; the witness' familiarity with participants in the lineup; knowledge possessed by the other participants of who the suspect is; distinctive placement of the suspect in the line; and distinctive clothing worn by the suspect. Williams & Hammelman, *supra* note 31, at 486-90. *Accord* Moore v. Illinois, 434 U.S. 220 (1977) (after hearing prosecution's

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permit informed challenges to witnesses in court.[39] In a companion case, *Gilbert v. California*,[40] the Court extended the *Wade* holding to state prosecutions.[41] The majorities in *Wade* and in *Gilbert*, however, failed to determine the earliest pretrial stage at which the right could attach.[42] Absent such guidance, many state and federal courts construed *Wade* and *Gilbert* liberally,[43] granting the defendant a right to

evidence, police told victim she was going to see her assailant before she positively identified him); Foster v. California, 394 U.S. 440 (1969) (accused placed in lineup where he was only tall man wearing a hat); Gilbert v. California, 388 U.S. 263 (1967) (witnesses communicated with each other before and during lineup); Saltys v. Adams, 465 F.2d 1023 (2d Cir. 1972) (witness saw photo of suspect before observing suspect in lineup). The informality of postarrest, pretrial lineup identifications minimizes the use of procedural safeguards that diminish suggestion. *See* United States v. Wade, 388 U.S. 218 (1967); United States v. Roth, 430 F.2d 1137 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); Long v. United States, 424 F.2d 799 (D.C. Cir. 1969). *See generally* N. SOBEL, *supra* note 4; P. WALL, *supra* note 31.

38. Scientists have conducted experiments to evaluate the reliability of lineup identifications. Although performed under favorable conditions, all experiments demonstrated a high degree of inaccuracy associated with eyewitness identification. *See* Brown, *An Experience in Identification Testimony*, 25 J. AM. INST. CRIM. L. & CRIMINOLOGY 621 (1935); Chenoweth, *Police Training Investigates the Fallibility of the Eye Witness*, 51 J. CRIM. L. CRIMINOLOGY & P.S. 378 (1960); Vickery & Brooks, *Time-Spaced Reporting of a "Crime" Witnessed by College Girls*, 29 J. CRIM. L. CRIMINOLOGY & P.S. 371 (1938).

39. Accurate recollection of the custodial lineup at trial would enable the defense to conduct a "meaningful cross-examination" of the eyewitness, safeguarding defendant's right to confront the witnesses against him. 388 U.S. at 232, 235.

40. 388 U.S. 263 (1967).

41. *Id.* at 270. *See supra* note 33. A second preindictment identification case decided in the same term was Stovall v. Denno, 388 U.S. 298 (1967). The Court in *Stovall* noted that the *Wade-Gilbert* decisions could not be applied retroactively and established an alternate due process challenge. The accused could attack the pretrial lineup on the ground that "the confrontation . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." *Id.* at 301-02. Since *Stovall*, the Supreme Court has employed the due process standard to determine whether the pretrial identification procedure used was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968) (photograph identification). *Accord* Manson v. Brathwaite, 432 U.S. 98 (1977) (photographic identification); United States v. Ash, 413 U.S. 300 (1973) (same); Neil v. Biggers, 409 U.S. 188 (1972) (showup); Kirby v. Illinois, 406 U.S. 682 (1972) (police station showup); Coleman v. Alabama, 399 U.S. 1 (1970) (witness confronted the suspect prior to corporeal lineup); Foster v. California, 394 U.S. 440 (1968) (photographic identification).

42. Although defendant in *Wade* was identified during a postindictment lineup, 388 U.S. at 237, the Court did not indicate that counsel's assistance could only attach at this stage. *Id.* at 226-39. Justice Black objected to the majority's equivocal criterion and emphasized that a defendant is entitled to counsel at identification "regardless of when the identification occurs, in time or place, and whether before or after indictment or information." *Id.* at 251 (Black, J., concurring in part and dissenting in part).

43. *See, e.g.*, People v. Fowler, 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969); State v. Singleton, 253 La. 18, 215 So. 2d 838 (1968), *vacated*, Johnson v. Louisiana, 408 U.S. 932 (1972); Palmer v. State, 5 Md. App. 691, 249 A.2d 482 (1969); Commonwealth v. Guillory, 356 Mass. 591,

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counsel at preindictment and preinformation lineups.[44]

In 1972, however, the Supreme Court in *Kirby v. Illinois*[45] restricted the *Wade-Gilbert* rule[46] and limited attachment of the right to counsel to postindictment custodial lineups.[47] In a plurality opinion, the Court held that because any procedure occurring before the "initiation of adversary judicial criminal proceedings"[48] was not critical,[49] no right to counsel could then attach. The Court maintained that the fifth amend-

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254 N.E.2d 427 (1970); People v. Hutton, 21 Mich. App. 312, 175 N.W.2d 860 (1970); Thompson v. State, 85 Nev. 134, 451 P.2d 704, *cert. denied,* 396 U.S. 893 (1969); State v. Wright, 274 N.C. 84, 161 S.E.2d 581 (1968), *cert. denied,* 396 U.S. 934 (1969); State v. Isaacs, 24 Ohio App. 2d 115, 265 N.E.2d 327 (1970); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738, *cert. denied,* 400 U.S. 919 (1970); *In re* Holley, 107 R.I. 615, 268 A.2d 723 (1970); Martinez v. State, 437 S.W.2d 842 (Tex. Crim. App. 1969); State v. Hicks, 76 Wash. 2d 80, 455 P.2d 943 (1969); Hayes v. State, 46 Wis. 2d 93, 175 N.W.2d 625 (1970). The California Supreme Court in People v. Fowler concluded:

> [T]he *Wade* and *Gilbert* rules are not limited in their application to lineups occurring after indictment. . . . The presence or absence of those conditions attendant upon lineups which induced the high court to term such proceedings 'a critical stage of the prosecution' at which the right to counsel attaches is certainly not dependent upon the occurrence or nonoccurrence of proceedings formally binding a defendant over for trial.

1 Cal. 3d 335, 342, 461 P.2d 643, 648-49, 82 Cal. Rptr. 363, 368-69 (1969).

Several states declined to apply the *Wade-Gilbert* ruling to preindictment or preinformation lineups. *See, e.g.,* State v. Fields, 104 Ariz. 486, 455 P.2d 964 (1969); Perkins v. State, 228 So. 2d 382 (Fla. 1969); State v. Walters, 457 S.W.2d 817 (Mo. 1970); Buchanan v. Commonwealth, 210 Va. 664, 173 S.E.2d 792 (1970).

44. Most of the United States circuit courts found no distinction between lineups held before or after filing an indictment, information, or complaint. These courts held that the right to counsel should attach at either stage. *See, e.g.,* Wilson v. Gaffney, 454 F.2d 142 (10th Cir.), *cert. denied,* 409 U.S. 854 (1972); Virgin Islands v. Callwood, 440 F.2d 1206 (3d Cir. 1971); United States v. Greene, 429 F.2d 193 (D.C. Cir. 1970); Cooper v. Picard, 428 F.2d 1351 (1st Cir. 1970); United States v. Phillips, 427 F.2d 1035 (9th Cir.), *cert. denied,* 400 U.S. 867 (1970); United States v. Ayers, 426 F.2d 524 (2d Cir.), *cert. denied,* 400 U.S. 842 (1970); United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969), *cert. denied,* 396 U.S. 1017 (1970); Rivers v. United States, 400 F.2d 935 (5th Cir. 1968).

45. 406 U.S. 682 (1972).

46. *See supra* notes 30-42 and accompanying text.

47. In the absence of defendant's counsel, witnesses positively identified defendant in a police station showup before the State filed a complaint or an indictment against him. The *Kirby* Court held that *Wade* and *Gilbert* did not apply to preindictment confrontations. Thus, the witness's in-court identification, although it was based on a preindictment showup, was admissible because it did not violate defendant's sixth amendment right to counsel. 406 U.S. at 684-87, 690-91.

48. The Court maintained that the "initiation of judicial criminal proceedings . . . is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." *Id.* at 689. Accordingly, the *Kirby* Court held any proceeding that occurred before filing a formal charge to be antecedent to the initiation of judicial criminal proceedings.

The dissent in *Kirby* argued that the Court's distinction between preindictment and postindict-

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ment's due process guarantee[50] affords the accused adequate protection against the risks[51] surrounding pretrial confrontations conducted prior to the formal commencement of prosecution proceedings.[52]

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ment identification proceedings was irrelevant. Reemphasizing the *Wade* Court's reasoning, Justice Brennan, joined by Justices Douglas and Marshall, argued that:

> *Wade* did not require the presence of counsel at pretrial confrontations for identification purposes simply on the basis of an abstract consideration of the words 'criminal prosecutions' in the sixth amendment. Counsel is required at those confrontations because [of] 'the dangers inherent in eyewitness identification and the suggestability inherent in the context of the pretrial identification.'

Id. at 696-97 (Brennan, J., dissenting). *See* Grano, *supra* note 4, at 725-30; Note, *The Pretrial Right to Counsel, supra* note 29, at 410-13; Note, *The State Responses to* Kirby v. United States, *supra* note 29, at 432-34.

In 1977, the Supreme Court in Moore v. Illinois, 434 U.S. 220 (1977), modified *Kirby*'s holding that the right to counsel could attach only after filing an indictment or information. In *Moore*, the Supreme Court clarified the "initiation of adversary judicial criminal proceedings" standard established in *Kirby* by determining that not only the return of an indictment but also the filing of a complaint marks the commencement of adversarial judicial proceedings. *Id.* at 228. In *Moore*, the suspect participated in a postcharge, preindictment identification showup without the assistance of counsel. The Court held the identification confrontation unconstitutional. Although the State had not yet filed a formal indictment, the filing of a complaint was sufficient to commence judicial criminal proceedings under Illinois law. *Id. See* ILL. REV. STAT. ch. 38, § 111 (1975).

49. 406 U.S. at 690. *See supra* notes 26 & 32 and accompanying text.

50. The pertinent text of the fifth amendment reads: "No person shall be . . . compelled in any criminal case to be . . . deprived of life, liberty, or property without due process of law. . . ." U.S. CONST. amend. V.

In offering the accused the alternative due process safeguard, the Court adhered to the rationale presented in Stovall v. Denno, 368 U.S. 298 (1967).

51. *See supra* notes 34-35 & 37-38.

52. The dissent in *Kirby* contended that the distinction between investigatory procedures occurring before and those occurring after the commencement of adversary proceedings "exalts form over substance." 406 U.S. at 697-99. The dissent argued that once the accused is in the custody of the police "or otherwise deprived of his freedom of action in any significant way . . . our adversary system of criminal proceedings commences." *Id.* at 698 n.6 (Brennan, J., dissenting) (quoting Miranda v. Arizona, 384 U.S. 436, 477 (1966)).

The California Supreme Court also criticized the *Kirby* preindictment-postindictment dichotomy:

> [W]e think it clear that the establishment of the date of formal accusation as the time wherein the right to counsel at lineup attaches could only lead to a situation wherein substantially all lineups would be conducted prior to indictment or information. We cannot reasonably suppose that the high court . . . would announce a rule so susceptible of emasculation by avoidance.

People v. Fowler, 1 Cal. 3d 335, 344, 461 P.2d 643, 650, 82 Cal. Rptr. 363, 370 (1969).

Opponents of *Kirby* assert that defendants especially need the assistance of counsel at preindictment identification proceedings. They argue that this is the stage when misidentification, which could result in the conviction of innocent persons at trial, is most likely to occur. N. SOBEL, *supra* note 4, at §§ 2-10 to -11; Williams & Hammelman, *supra* note 31, at 83.

Police and prosecutors, on the other hand, welcomed the *Kirby* limitation. They believed that limiting the scope of the right to counsel to postindictment proceedings would expedite criminal

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A majority of state courts have adopted *Kirby*,[53] using the "commencement of formal judicial proceedings"[54] standard as a guideline for determining when to extend to a defendant his sixth amendment right to counsel. A few states,[55] however, refuse to conform to the Supreme Court restriction and continue to apply *Wade*'s critical stage rationale.[56] These states circumvent the limitation imposed by *Kirby* and extend the right to counsel to preindictment custodial lineups by

investigations. *See* N. SOBEL, *supra* note 4, at §§2-10 to -11; Comment, *The Right to Counsel at Lineups*: Wade *and* Gilbert *in the Lower Courts*, 36 U. CHI. L. REV. 830, 839 (1969).

53. *See, e.g.*, State v. Taylor, 109 Ariz. 518, 514 F.2d 439 (1973); State v. Bragg, 371 So. 2d 1080 (Fla. Dist. Ct. App. 1979); Hunt v. Hopper, 232 Ga. 53, 205 S.E.2d 303 (1974); State v. Sadler, 95 Idaho 524, 511 P.2d 806 (1973); Winston v. State, 263 Ind. 8, 323 N.E.2d 228 (1975); Williamson v. State, 201 N.W.2d 490 (Iowa 1972); State v. Rudolph, 332 So. 2d 806 (La.), *cert. denied*, 429 U.S. 982 (1976); State v. Rowe, 314 A.2d 407 (Me. 1974); Jackson v. State, 17 Md. App. 167, 300 A.2d 430 (1973); Commonwealth v. Stanley, 363 Mass. 102, 292 N.E.2d 694 (1973); State v. Carey, 296 Minn. 214, 207 N.W.2d 529 (1973); Hobson v. State, 285 So. 2d 464 (Miss. 1973); Reed v. Warden, 89 Nev. 141, 508 P.2d 2 (1973); Stewart v. State, 509 P.2d 1402 (Okla. Crim. App. 1973); State v. Delahunt, 401 A.2d 1261 (R.I. 1979); State v. McLeod, 260 S.C. 445, 196 S.E.2d 645 (1973). Missouri and Wisconsin have adhered to *Kirby* but have criticized its reasoning. *See, e.g.*, State v. Gray, 503 S.W.2d 457 (Mo. Ct. App. 1973); State v. Taylor, 60 Wis. 2d 506, 210 N.W.2d 873 (1973).

The New York Supreme Court articulated specific exceptions to the *Kirby* holding. *See* People v. Banks, 73 A.D.2d 907, 424 N.Y.S.2d 439 (1980) (suspect retained counsel on prior charges; right to counsel on new charges automatically attaches); People v. Coleman, 43 N.Y.2d 222, 371 N.E.2d 819, 401 N.Y.S.2d 57 (1977) (same). *Contra* State v. Marks, 226 Kan. 704, 602 P.2d 1344 (1979) (the right to counsel does not attach to preindictment lineups on new charges when suspect detained on prior charge); State v. Montgomery, 596 S.W.2d 735 (Mo. Ct. App. 1980) (same); State v. Puckett, 46 N.C. App. 719, 266 S.E.2d 48, *appeal dismissed*, 270 S.E.2d 115 (N.C. 1980) (although defendant in police custody on another charge, absence of counsel at preindictment lineup on new charge was not unconstitutional per se). In addition, both New York and Alabama grant the accused the right to the assistance of counsel at a postarrest, preindictment identification if the accused has already retained counsel. *See* Sparks v. State, 376 So. 2d 834 (Ala. Crim. App. 1979); People v. Blake, 35 N.Y.2d 331, 320 N.E.2d 625, 361 N.Y.S.2d 881 (1974).

54. The Illinois criminal code provides: "When authorized by law, a prosecution may be commenced by: (a) a complaint, (b) an information, (c) an indictment." ILL. REV. STAT. ch. 38, § 111-1 (1980).

The documents of indictment and information are commonly used to charge a suspect with a felony; a complaint is most often used to charge a suspect with a misdemeanor. The type of charging document employed in particular circumstances will vary and depend upon the criminal offense and the state. The term "formal charges" generally refers to an indictment, information, or complaint. A majority of state criminal codes contain provisions similar to those in the Illinois criminal code.

55. Alaska, Michigan, Pennsylvania, and now California reject the *Kirby* approach. *See infra* notes 56-58 and accompanying text.

56. *See* Blue v. State, 558 P.2d 636, 642 (Alaska 1977); People v. Jackson, 391 Mich. 323, 339, 217 N.W.2d 22, 27-28 (1974); People v. Bustamante, 30 Cal. 3d 88, 98-99, 634 P.2d 927, 933-34, 177 Cal. Rptr. 576, 582-83 (1981); People v. Anderson, 389 Mich. 155, 171-72, 205 N.W.2d 461, 467-68 (1973); Commonwealth v. Richman, 320 A.2d 351, 361 (1974) (Eagen, J., concurring).

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broadly interpreting the *Kirby* definition of "adversary criminal proceedings"[57] or by relying on the state constitutional provisions establishing the right to counsel.[58]

In *People v. Bustamante*,[59] California became the third state to circumvent the *Kirby v. Illinois* restriction and to extend the right to counsel to preindictment lineups[60] by relying on a parallel state constitutional guarantee.[61] Writing for the majority, Justice Tobriner initially considered earlier United States Supreme Court decisions for guidance.[62] He noted, however, that California courts are not bound by these decisions in interpreting provisions of the California Constitution.[63]

Justice Tobriner proceeded to apply the critical stage standard, set forth by the Supreme Court in *United States v. Wade*,[64] to determine whether the section of the California Constitution that guarantees a criminal defendant the right to counsel extends to a pretrial lineup.[65] He asserted that because a properly conducted lineup is invaluable in augmenting the reliability of identification testimony and because mistaken identifications substantially influence the outcome of the trial, the pretrial lineup constitutes a "critical stage" in a criminal proceeding.[66] Justice Tobriner held that a fairly conducted lineup is essential to the protection of innocent defendants[67] and that although the defense counsel plays a limited role during this proceeding, his presence helps

57. The court in Commonwealth v. Richman, 320 A.2d 351 (Pa. 1974), for example, determined that arrest signaled the commencement of judicial proceedings in Pennsylvania. *Id.* at 353.

58. *See, e.g.,* Blue v. State, 558 P.2d 636 (Alaska 1977); People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974). The Supreme Court of Alaska declared that it "is not limited by decisions of the United States Supreme Court or by the United States Constitution when interpreting the state constitution. The Alaska Constitution may have broader safeguards than the minimum federal standards." 558 P.2d at 641. The Michigan Supreme Court adopted similar reasoning. 391 Mich. at 337-38, 217 N.W.2d at 27.

59. 30 Cal. 3d 88, 634 P.2d 927, 177 Cal. Rptr. 576 (1981).

60. *See supra* notes 4 & 31.

61. *See supra* note 2.

62. Justices Mosk, Newman and Weiner joined in the majority opinion. Justice Tobriner presented a state constitutional argument similar to that espoused by the Alaska Supreme Court in Blue v. State, 558 P.2d 636 (Alaska 1977). *See supra* note 58.

63. 30 Cal. 3d at 97, 634 P.2d at 932, 177 Cal. Rptr. at 581-82.

64. 388 U.S. 218, 224 (1967). For a discussion of *Wade*, see *supra* notes 30-39 and accompanying text.

65. 30 Cal. 3d at 98-102, 634 P.2d at 933-35, 177 Cal. Rptr. at 582-85.

66. *Id.*

67. *Id.* at 99, 634 P.2d at 934, 177 Cal. Rptr. at 583.

to safeguard a defendant's rights.[68]

After concluding that a defendant's right to counsel extends to pretrial lineups,[69] Justice Tobriner considered the question of whether the right should be limited to postindictment lineups.[70] He condemned the Supreme Court's restriction of the right to counsel to postindictment proceedings in *Kirby* as "wholly unrealistic,"[71] stating that a defendant frequently requires counsel's assistance prior to the filing of formal charges.[72] Justice Tobriner further maintained that any burden on police investigations resulting from an extension of the right to counsel to preindictment lineups is not substantial enough to deny the defendant this safeguard.[73] In support of this contention, he noted that during the five years between *Wade* and *Kirby*, California criminal defendants were provided with counsel at preindictment lineups with no significant

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68. *Id.* Justice Tobriner explained that

> [a] requirement for counsel at lineups encourages the police to adopt regulations to ensure the fairness of the lineups . . . and to follow those regulations. . . . The attorney may detect inadvertent suggestive actions not within the scope of prostective regulations. Finally, counsel's observations will help him to prepare for cross-examination of the identifying witness and for argument at trial.

Id.

69. *Id.* at 100, 634 P.2d at 934-35, 177 Cal. Rptr. at 583-84. Justice Tobriner contended that "[s]ince the presence of counsel can contribute significantly to the protection of his client from misidentification, defendant is entitled to have counsel present to assist him at that critical juncture." *Id.*

70. *Id.* at 101-02, 634 P.2d at 935-36, 177 Cal. Rptr. at 584-85.

71. *Id.* at 100, 634 P.2d at 935, 177 Cal. Rptr. at 584.

72. *Id.* Justice Tobriner reasoned that limiting the attachment of the right to counsel to postindictment proceeding as advocated in *Kirby* would render defendant's right to counsel ineffective at later stages in the criminal process:

> [T]o limit the right to counsel at a lineup to postindictment lineups would as a practical matter nullify that right. 'The defendant who most needs protection from erroneous identification is one who is implicated primarily or solely by eyewitness testimony. Yet, because of this lack of noneyewitness evidence, an identification of the defendant in a lineup or showup would be necessary to justify formal charges or arraignment. Consequently, the crucial confrontation necessarily will be held before the initiation of formal judicial proceedings when the defendant can be deprived of counsel. Thus *Kirby* removes the protective effects of counsel's presence precisely when the danger of convicting an innocent defendant upon a mistaken identification is greatest. furthermore, after *Kirby*, the policy may defeat the aims of *Wade* and *Gilbert* in *any* case simply by delaying formal charges and holding the lineup in the absence of defense counsel.'

Id. at 101, 634 P.2d at 935, 177 Cal. Rptr. at 584 (quoting Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification,* 29 STAN. L. REV. 969, 996 (1977)). Thus, the majority believed that the formalistic approach of "initiation of adversary judicial proceedings" espoused in *Kirby* can be easily circumvented by police, effectively defeating the safeguard of the right to counsel.

73. *Id.* at 101, 634 P.2d at 935, 177 Cal. Rptr. at 584.

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impediment on police investigations.[74] The *Bustamante* majority concluded that the California Constitution guarantees the criminally accused the right to assistance of counsel at preindictment custodial lineups.[75]

Writing for the concurrence,[76] Chief Justice Bird[77] disagreed with the court's observation in dictum that counsel's role at a lineup is "limited."[78] Rather, she maintained that counsel must assume an active role at pretrial lineups not only to ensure that proper procedures are used and to provide effective assistance, but also to protect the constitutional right of the defendant to meaningful cross-examination of witnesses at trial.[79]

Justice Richardson, the sole dissenter, disapproved of the majority's "selective reliance" on the state constitution to supersede the limitations established by the United States Supreme Court.[80] He endorsed

74. *Id.* The majority noted, however, that the absence of counsel at a pretrial identification proceeding would be excusable under exigent circumstances "[i]f conditions require immediate identification without even minimal delay, or if counsel cannot be present within a reasonable time, such exigent circumstances will justify proceeding without counsel." *Id.* at 101-02, 634 P.2d at 935, 177 Cal. Rptr. at 584 (footnote omitted).

75. The court held further that its decision would render the in-court identification testimony in question inadmissible unless the trial court, on remand, found that the testimony rested on a "basis independent from and untainted by the improper lineup." *Id.* at 103, 634 P.2d at 936, 177 Cal. Rptr. at 585.

The *Bustamante* court also considered the retroactive effect of its holding. Recognizing that prior to *Bustamante*, police, prosecutors and courts did not extend the right to counsel to preindictment lineups, the court declined to apply the decision retroactively. Moreover, the court believed that the decision denying retroactive application would avoid disruption of prior investigations and pending prosecutions. *Id.* at 102, 634 P.2d at 936, 177 Cal. Rptr. at 585.

People v. Cook, 22 Cal. 3d 67, 583 P.2d 130, 148 Cal. Rptr. 605 (1978), controlled with respect to Bustamante's appeal. *Cook* held that decisions overruling earlier rulings on criminal procedure should apply to the individual who raised the procedural issue on appeal. 30 Cal. 3d at 102, 634 P.2d at 936, 177 Cal. Rptr. at 585.

76. *Id.* at 104-06, 634 P.2d at 937-38, 177 Cal. Rptr. at 586-88.

77. Justice Staniforth joined in the concurring opinion. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 109, 634 P.2d at 940, 177 Cal. Rptr. at 589 (citing People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976) (Richardson, J., dissenting)). Justice Richardson believed that personal disagreement among a majority of members of a state court is insufficient reason to reject a United States Supreme Court ruling. He argued that, absent unique or distinguishing characteristics of a state case, there is no justification for the state supreme court to depart from the United States Supreme Court's interpretation of a constitutional provision that is virtually identical to the state constitutional provision. 16 Cal. 3d at 118-19, 545 P.2d at 283-84, 127 Cal. Rptr. at 371-72 (Richardson, J., dissenting).

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the rationale set forth by the Supreme Court in *Kirby v. Illinois*,[81] contending that the application of the critical stage test should be restricted to "criminal prosecutions."[82] Justice Richardson also adopted the *Kirby* Court's argument that the filing of formal charges signals the commencement of the adversarial criminal justice process.[83] Relying on *Kirby*'s distinction between the investigation and prosecution stages of a criminal proceeding, the dissent asserted that lineups conducted during custodial investigations are not "critical" merely because of their potential unreliability.[84] Justice Richardson reasoned that the due process standard of the fourteenth amendment affords the accused adequate protection against abuses of identification procedures.[85]

In addition, Justice Richardson maintained that counsel's role at a lineup is passive and that such presence does not provide the accused with absolute protection against mistaken identification or suggestiveness.[86] He argued that an extension of the right to counsel during preindictment lineups would only impose unnecessary burdens and delays on police investigations[87] and concluded that the majority's rejection of *Kirby* was "unnecessary and unwise."[88]

The *Bustamante* Court correctly concluded that counsel's presence at all pretrial lineups is essential to a complete and effective defense of the criminally accused.[89] The highly prejudicial impact that an improperly conducted preindictment lineup could have on a criminally accused at trial, in terms of both the possibility of mistaken identification[90] and the deprivation of effective cross-examination,[91] certainly renders this

81. 30 Cal. 3d at 106, 634 P.2d at 938, 177 Cal. Rptr. at 587.

82. *Id.* at 107, 634 P.2d at 938, 177 Cal. Rptr. at 588.

83. *Id.* at 106-07, 634 P.2d at 938, 177 Cal. Rptr. at 587-88.

84. *Id.*

85. *Id.* at 107-08, 634 P.2d at 939, 177 Cal. Rptr. at 588. Justice Richardson contended that:

> any abuse of identification procedures, including improperly suggestive lineups, may be fully reviewed under applicable due process standards . . . . As stressed by the high court in *Kirby*, '*Stovall* strikes the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime.'

Id.

86. *Id.* at 108-09, 634 P.2d at 939-40, 177 Cal. Rptr. at 589 (citations omitted).

87. Justice Tobriner maintained that "harried police personnel busily engaged in an ongoing investigation are further shackled because they may well be unable accurately to determine whether or not a true 'exigency' exists." *Id.* at 108-09, 634 P.2d at 940, 177 Cal. Rptr. at 589.

88. *Id.* at 109, 634 P.2d at 940, 177 Cal. Rptr. at 589.

89. *See id.* at 99-101, 634 P.2d at 934-35, 177 Cal. Rptr. at 583-84.

90. *See supra* notes 34, 37, 38 & 71-72 and accompanying text.

91. *See supra* notes 36, 39, 68-69 & 71-72 and accompanying text.

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stage of the criminal prosecution "critical." In *People v. Bustamante* the California Supreme Court recognized that identical risks of misidentification and suggestion are present in all custodial lineups, whether they are conducted before or after the filing of formal charges.[92] As the *Bustamante* majority concluded, the imposition of the *Kirby* restriction would "exalt form over substance"[93] and effectively deny the defendant his constitutional right to a fair trial, as well as his right to counsel.[94]

The dissent's distinction between investigatory and adversary judicial proceedings, adopted from *Kirby v. Illinois*,[95] suggests that the dangers inherent in pretrial identification procedures[96] threaten a defendant's right to a fair trial only when the identification occurs *after* the filing of formal charges.[97] Unless the state decides not to prosecute, however, the effect of an improperly conducted preindictment lineup is as detrimental to the defendant at trial as is an improperly conducted postindictment lineup.[98] In addition, the due process safeguard advocated in *Kirby*[99] and reiterated in Justice Richardson's dissent in *Bustamante*[100] provides an inadequate substitute for the presence of counsel at a preindictment lineup. Defense counsel's absence during pretrial identification proceedings renders him unable to make informed challenges to the credibility and admissibility of the State's identification evidence at trial.[101]

The California Supreme Court's reliance on its state constitution as an independent source granting the right to counsel represents a valid exercise of its authority and is not without precedent.[102] The Supreme Courts of Alaska[103] and Michigan,[104] for example, have successfully relied on state constitutional guarantees of the right to counsel to cir-

92. 30 Cal. 3d at 100-01, 634 P.2d at 935, 177 Cal. Rptr. at 584.
93. *Id. See supra* note 52.
94. 30 Cal. 3d at 100-01, 634 P.2d at 935, 177 Cal. Rptr. at 584.
95. *Id.* at 106-08, 634 P.2d at 938-39, 177 Cal. Rptr. at 587-88.
96. *Id. See supra* notes 34-38 & 72 and accompanying text.
97. 30 Cal. 3d at 106-08, 634 P.2d at 938-39, 177 Cal. Rptr. at 587-88.
98. *Id.* at 100-01, 634 P.2d at 935, 177 Cal. Rptr. at 504.
99. *See supra* notes 50-52 and accompanying text.
100. *See supra* note 85 and accompanying text.
101. *See supra* notes 36-39 & 68 and accompanying text.
102. *See supra* note 58 and accompanying text.
103. *Id.*
104. *Id.*

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cumvent the *Kirby* holding.[105]

The *Kirby* holding, advocated in a majority of jurisdictions,[106] ignores the substantial risks of prejudice to a defendant resulting from improperly conducted preindictment identification procedures.[107] The assumption that the dangers inherent in custodial lineups become viable only after the commencement of formal judicial proceedings is without merit. The presence of counsel during a pretrial lineup—whether conducted before or after the filing an indictment or complaint—is essential to preserve the defendant's right to a fair trial.

J.A.S.

105. *See supra* notes 55-58 and accompanying text.
106. *See supra* notes 53-54 and accompanying text.
107. *See supra* notes 34-39, 66-67 & 71-72 and accompanying text.

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